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In the Supreme Court of the United States

October Term, 1973

No. 73-669

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al,

Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 19, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Admiral-Merchants Motor Freight, Inc., et al.,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in these proceedings (consolidated in the Court of Appeals) on July 12, 1973.

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[1] Other Petitioners: Brady Motorfrate, Inc., Poole Transfer, Inc., Burlington Truck Lines, Inc., Dohrn Transfer Co., I & S-McDaniel, Inc., Interstate Motor Freight System, Knox Motor Service, Inc., Rock Island Motor Transit Co., Spector Freight System, Inc., and Yellow Transit Freight Lines, Inc.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is reported unofficially at 1973 Federal Carrier Cases para. 84,420, and 42 U.S. L. W. 2072.

The opinions of the trial court which were affirmed are in part reported at 337 F. Supp. 674, 337 F. Supp. 683 and 342 F. Supp. 166. All decisions are set forth in the appendices.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 12, 1973. A timely petition for rehearing *en banc* was denied on September 19, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether § 16(2) of Part I of the Interstate Commerce Act has been incorporated into the Motor Carrier Act so as to establish a private cause of action for enforcement of an I.C.C. "refund" order against motor carriers.

2. Whether an I.C.C. finding of "not shown just and reasonable" entered in a motor carrier rate-making proceeding is a sufficient predicate for post-shipment awards of damages to complaining shippers.

3. Whether motor carriers may be held to have "tacitly agreed" to deviate from effective increased tariff levels and thereby be deprived of effective defenses in suits for refunds of the increases where they assert: (1) that the past charges were affirmatively reasonable when tested upon the historic facts surrounding the traffic; and (2) that compliance with the contested I.C.C. refund language would result in confiscation; and (3) that the refund "order" is void.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

§ 16(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

§ 305(g) Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this Title: *Provided,* That where the Commission, in respect of any matter arising under this chapter, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of Title 28, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

STATEMENT OF THE CASE

These cases involve a court's "enforcement" of an Interstate Commerce Commission (hereinafter referred to as "the Commission" or "the I.C.C.") refund order against motor carriers in a shipper's actions for damages.

During the course of a general revenue investigation proceeding, upon request of certain Protestants (which had been acquiesced in by the motor carrier respondents), the I.C.C. granted a *necessary* continuance. The procedural order of April 25, 1968, however, contained a refund mandate in the language of a condition:

> *And it is further ordered,* That respondents be, and, they are hereby ordered to make refunds to the shippers on any shipments moving after May 20, 1968, to the extent that the increases on any portion thereof under investigation herein are not approved by the Commission, Appx. 143.[2]

The carrier respondents filed a petition for reconsideration to this order, then withdrew the petition leaving the order stand "as issued".

Following hearing, the I.C.C. entered its report and order, finding the increased rates (which had become effective *without suspension*) "have not been shown to be just and reasonable" and ordered their cancellation. Appx. 24. This failure of proof finding was due to the rejection of certain evidence with the resultant failure "to present a sufficient showing with regard to the effect of the wage increases upon total expenses and unit costs of the carriers". Appx. 24. The I.C.C. . . .

> . . . *further ordered,* That, in accordance with the order entered herein on April 25, 1968, the

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[2]The reference is to the first Appendix filed in the Seventh Circuit. A Supplemental Appendix (S. Appx. ___) was filed in the second series of 8 cases, later consolidated in the Seventh Circuit. The Appendices to this Petition are referenced by page number (e.g., "B-6").

> respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable. Appx. 24.

The motor carriers sought further hearing directed at the refund language based upon tendered evidence concerning the actual experience of the carriers under the "proposed" rates. On August 29, 1969, the I.C.C., based upon the same evidence, permitted even higher rates to take effect from the day following the date of cancellation of the investigated increases, but denied reconsideration or further hearing on the refund language. The Commission did modify its prior decision slightly ordering:

> . . . that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence. Appx. 146.

Upon further petitions by the carriers and by certain shipper protestants, the Commission denied the relevancy of reparations decisions to the order which it entered in the rate-making proceeding. Simultaneously, the protestants' prayer for (1) an accounting or (2) a self-executing pay-back order was denied,

> because the order of August 29, 1969, did not change the liability for making refunds, previously determined, but appropriately placed the burden for supporting claims for refunds upon the shippers who paid the charges. Appx. 233.

Later, the Commission

> Voted to authorize the General Counsel to state to the district court in a motion to dismiss the action (Civil Action No. C-2030) or other appropriate

> pleading, that the true basis of the shippers' right to a refund is their common law remedy for restitution . . .. Appx. 203.

Certain of the motor carriers applied for injunctive relief to the three-judge court, continuing to maintain that the Commission was without authority to award refunds under Part II of the Act. Holding that the I.C.C. had no common law (321 F. Supp. at 358), or statutory (321 F. Supp. at 358) power to enter a refund order, and that as a procedural device it could not commend the Commission action (321 F. Supp. at 360), the three-judge court nevertheless refused to annul the refund order, because of the motor carriers' initial withdrawal of objection to the inchoate refund language contained in the I.C.C. order which granted the continuance.[3] This Court affirmed the three-judge dismissal of the Urgent Deficiencies Act suit and denied the motor carriers' petition for rehearing. 404 U.S. 802; 404 U.S. 987.

On May 19, 1970, Alcoa commenced eleven section 304a reparation suits, erroneously alleging that the rates had been found unjust and unreasonable. Appx. 10. The jurisdiction of the trial court was invoked under 28 U.S.C. § 1337, only. Appx. 8. Although it had not been a party to either the I.C.C. case or the direct appeal, Alcoa on May 7, 1971 and March 14, 1972, moved for summary judgments for damages based on the enforcement provisions of section 16(2) of Part I of the Interstate Commerce Act. Holding that the claims for enforcement were properly and timely presented, and that claims would lie under § 16(2) against motor carriers, and that the I.C.C. order was valid and enforceable, the trial court granted judgment, including pre-judgment interest (commencing prior to the last shipments and payments involved), costs and attorney fees against the motor carriers. The Seventh Circuit affirmed, essentially adopting the trial court's rationale.

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[3] *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F. Supp. 353 (D. Colo., 1971), aff'd 404 U.S. 802, reh. den. 404 U.S. 987 (1971).

REASONS FOR GRANTING THE WRIT

The great importance of the novel Seventh Circuit interpretation and construction of the involved sections of the Interstate Commerce Act is underscored by the direct and the potential ramifications of the decisions below in an enormous volume of related cases presently pending throughout the United States. Direct and substantial conflicts with prior rulings of this Court are presented. The manifest injustice of the results, coupled with the lack of uniformity in results to date, indicates the necessity for the exercise of this Court's powers of supervision and for prompt resolution of the issues presented.

Essential to the determination that a claim would lie against motor carriers under § 16(2) of Part I of the Interstate Commerce Act[4] was the holding that § 16(2) had been incorporated by implication into the Motor Carrier Act through section 305(g).[5] Compare the *express* incorporation of section 16(13) into Part II. 49 U.S.C. § 304(d). Conceding the carriers' contentions that . . .

> (a) the legislative history of § 305(g) is devoid of any such Congressional intent; (b) the Commission has made numerous attempts to influence Congress to pass legislation similar to Sections 8, 9, 13(1) and 16 to be added to Part II; and (c) there is not a single case in which Section 305(g) was utilized to create a cause of action by incorporation of Section 16.[6]

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[4]Part I, generally, regulates rail carriers and petroleum pipeline carriers except when the provisions thereof are expressly incorporated by a cognate provision of another part of the Act governing the activities of another type of carrier.

[5]The trial judge rejected all other grounds for relief. Thus, resolution of the issue of whether § 16(2) has been incorporated into Part II would be controlling of the ultimate outcome of the cases. See unreported decision of Chief Judge McManus in *Amana Refrigeration, Inc. v. Bruce Transfer & Storage Co.*, Civil Nos. 70-C-13-CR, 70-C-14-CR, 71-C-19-CR, 71-C-21-CR (N. D. Iowa, 1973), appeal pending, 8th Cir. Nos. 1507-1510.

[6]1973 F. Carr. Cas. para. 82,420, p. 56223.

the Seventh Circuit relied upon "the plain language" of Section 305(g). But that plain language had been unchanged since 1959, when this Court ruled:

> . . . §§ 13(1) and 16 of Part I give a shipper . . . the right . . . to enforce his reparation award in the courts, *and Part II contains no comparable provisions. T.I.M.E., Inc. v. United States*, 359 U.S. 464, 470, 471 (1959).[7]

The direct conflict between the Seventh Circuit's decision and the cited prior decision of this Court is express. In applying[8] the "plain language", the Circuit utterly disregarded several of the fundamental precepts normally applied in construing and interpreting the various sections of the various Parts of the Interstate Commerce Act – including the rule: *expressis unius est exclusis alterius.* Not only does Part II not include a provision permitting the I.C.C. to order refunds (such as is contained in § 15(7) of Part I), but there is no provision for private enforcement of such an order in Part II.

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[7]This ruling, in *T.I.M.E.*, was essential to the result therein reached. If sections 8, 9, 13(1) and 16 had been in Part II by inclusion under § 305(g), the shippers' contentions made in *T.I.M.E.* would have prevailed, for then the Circuit determination to remand to the I.C.C. would have been proper. But this Court concluded that the I.C.C. was without jurisdiction to resolve the questions of the past reasonableness of the charges involved. The Davidson portion of the *T.I.M.E.* appeals was almost duplicative of the historical background of these cases. See *Surcharges, New York State*, 62 M.C.C. 117 (1953); *United States v. Davidson Transfer & Storage Co.*, 259 F.2d 802 (D.C. Cir., 1958). *And*, the refund concept had been not only considered, but rejected in the Davidson portion of the *T.I.M.E.* case, a determination not affected by this Court's reversal on other grounds.

[8]The "plain language" of § 16(2), of course, expressly provides that suit may be brought if there is no compliance "within the time limit in such order". In applying that "plain language", the Circuit concluded that

> . . . there [is] no statutory requirement that a refund order issued pursuant to this procedural authority contain a time limit for compliance.

If the "right of relief" provisions of § 16(2) are incorporated into Part II, it is certainly arguable that *all* of the "relief" provisions of Part I are incorporated – a result patently out of accord with Congressional intent and a host of prior decisions of this Court. Indeed, such a result would render much of Part II redundant and wholly unnecessary legislation.

This Court's supervisory powers should be invoked when judicial legislation of the magnitude involved in this case occurs. The practical impact of the decision of the Circuit is of great and continuing consequence – and, not only upon these litigants and related cases. The decision will have repercussions in virtually all future I.C.C. general revenue investigations and rate proceedings.

The eleven cases consolidated in the court below are but a tiny fraction of the cases pending which are predicated upon the same order and usurpation of power by the I.C.C.[9] In total, the order has induced over 125 shippers to commence suit. These cases are being defended by more than 1000 motor carriers. The 143 complaints filed to date were brought in 21 different state and federal courts.[10] In the cases still in the trial courts, applications to add hundreds of additional plaintiffs are pending. One case is postured as a class action. The prayers of these assorted complaints range from 38 cents to twenty-five million dollars. The cases to which this Petition is directed constitute the "lead" cases by virtue of having been resolved first. The decisions to which this Petition is directed have already been followed in part in determinations by other trial judges across the country. The decisions to date, which are predominately adverse to the carriers, are uniform only in their lack of consistency in the application of the principles of the

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[9]The imposition of the refund requirement, whether entered as a condition or as a mandate, was a *sanction* against the motor carriers *by definition* under the A. P. A., 5 U.S.C. § 551 (10) (A), (B), (C), (E), (G). And, that Act provides that "A sanction may not be imposed . . . *except within jurisdiction delegated to the agency and as authorized by law*". 5 U.S.C. § 558(b). (Emphasis added).

[10]See Appx. A, attached, A-1, for a current synopsis of this mass of litigation.

Interstate Commerce Act.[11] Already, Appellate proceedings have been commenced in three Federal Courts of Appeals, concerning 28 of these cases.

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[11]See Appendix A, A-1. For example, in *Container Corp. v. Admiral-Merchants Motor Freight, Inc.*, (unreported) (N.D. Ill., 1972), on appeal, 7th Cir. No. 72-1646, the shippers' complaint was dismissed and motion for summary judgment denied. And, in *American Home Products Corp. v. A. & B. Transfer Co.*, (unreported) (N.D. Ill., 1972) the shippers' motion for summary judgment was denied. And, in *Bela Seating Co. v. Advance Transportation Co.*, 344 F. Supp. 854 (N.D. Ill., 1972) the shippers' motion for summary judgment was denied. Other cases have granted virtually identical motions: *Amana Refrigeration, Inc. v. Bruce Transfer & Storage Co.*, (unreported) (N.D. Iowa, 1973), appeal pending 8th Cir. Nos. 73-1507-1510; *Land O' Lakes, Inc. v. United Buckingham Freight Lines, Inc.*, 351 F. Supp. 102 (D. Minn., 1973); etc.

Res Judicata has been applied in these cases by the 7th Circuit, but the trial court refused to hold it technically applicable. The *American Home* decision, *supra*, likewise rejected its applicability. But it was applied in, e.g., *Procter & Gamble Co. v. Ideal Truck Lines*, 355 F. Supp. 547 (W. D. Mo., 1973) and *Land O' Lakes, supra*.

In *Container Corp., supra*, Judge Austin found no cause of action for restitution, overcharges, reparations or enforcement. In these cases, Judge Will rejected overcharges, restitution and reparations, but gave birth to the enforcement rationale. In *Procter & Gamble, supra*, the *Alcoa* rationale was followed as to enforcement, but rejected as to restitution, Judge Hunter ruling that as an alternative ground for relief. In *Land O' Lakes*, the trial judge rejected overcharges and restitution, but allowed enforcement and reparations. In *Amana, supra*, restitution was rejected and enforcement allowed.

In *S. S. Kresge Co. v. A. & B. Transfer*, (unreported) (E.D. Mich., 1972), appeal pending 6th Circuit No. 72-1967, summary judgment was granted, but no interest or fees allowed. In *Alcoa, Amana*, and *Land O' Lakes*, etcetera, fees were awarded in greatly varying amounts. In *Alcoa* interest was awarded at 6% from June 5, 1969. Similarly, in *Land O' Lakes*. In *Amana*, interest was awarded at 4% from Oct. 12, 1971. In two of the three *United States* cases interest has been at 4% from (a) June 5, 1969 and (b) May 4, 1970. In *Western Electric Co. v. Burlington Truck Lines, Inc.*, (unreported) (W. D. Mo., 1973), on appeal, 8th Circuit No. 73-1200, interest was allowed at 6% from June 25, 1970. In an Oct. 9, 1973 decision by the trial judge in these cases, *Levey Division v. Abel Freight Lines, Inc.*, (unreported) (N. D. Ill., 1973), Civil No. 71-C-1247, interest was awarded at 6% from June 5, 1969 except as to shipments upon which payment was not made until after that date. In

Certiorari was granted by this Court in *Federal Trade Comm'n v. Jantzen, Inc.*, 386 U.S. 228, 229 (1967), a case involving the enforceability of an order similar to a large number of other administrative orders. It is respectfully submitted that the circumstances appearing in this instance should also induce the Court to invoke its prerogative to review. Certiorari may also be granted because a considerable number of suits pending in the lower courts will turn on the resolution of the issues presented. See *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1964). The importance of the question of statutory construction involved is obvious. Cf., *Shapiro v. United States*, 335 U.S. 1, 4 (1947).

The potential impact of these cases reaches far beyond the I.C.C. order directly involved. For now that the I.C.C. apparently has succeeded in accomplishing indirectly (through an inferred procedural device) what it was precluded from doing directly (i.e., ordering refunds), it is certain that similar action will be urged by shippers and taken by the Commission in the future.

The result of the decision below is, and its future effect will unquestionably be, the upsetting of that delicate balance established by Congress in the rate-making provisions of the Motor Carrier Act. For if shippers may, as here, recover amounts

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[11] (Continued)
Procter & Gamble, supra, 6% was allowed from August 20, 1970. No interest was awarded, nor were costs awarded in *Bemis Co., Inc. v. Burlington Truck Lines, Inc.*, (unreported) (N. D. Ill., 1973), appeal dismissed upon stipulation on outcome of *Alcoa.*

In *Alcoa,* Judge Will indicated the date of the order as Aug. 27, 1969, from which the statute of limitations under § 16(3) (f) would run. In *Bela, supra,* the ruling was that the statute would not run until March, 1972. This latter decision was followed in *Amana, supra,* etcetera, but rejected in *Container Corp.*, wherein a complaint filed after June 5, 1969 was foreclosed. Judge Parsons, in *American Home, supra,* has permitted intervention and assertion of new claims by new shippers against new carriers since March of 1972 notwithstanding the substantive nature of the limitations provision.

The textual rationale for the decisions is as varied as the results have been. The lack of *uniformity* is apparent. Compare *Keogh v. Chicago N. W. R.R.*, 260 U.S. 159 (1922).

paid under *effective* increased rates (either investigated but not suspended, or established following suspension), then every semblance of the prior legislative balance is undermined. See discussion in *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 479, 480 (1959). Congress provided for a statutory 30-day period before filed rates could become effective. 49 U.S.C. §317(c). Congress added to the delay in the establishment of such rates when it granted the I.C.C. power to suspend such rates for 7 months beyond the initial 30-day waiting period. 49 U.S.C. §316(g). In theory, the I.C.C. was to ascertain, within that period, the reasonableness of the proposed rates for the future. If the determination were not made within that time, the rates nevertheless became effective, thus granting the carriers some relief (albeit belated) from the operation of the administrative lag. The lag, if any, in excess of 8 months, was to be borne by the shipping public. No relief was provided in the Act for the carriers. That is, they can never recover the revenues "lost" during the lag if the rates are shown to be reasonable for the future. But, previously, a balance was achieved by precluding shippers from recovering the increases in the event the proposed, but effective, rates were not proven reasonable for the future.[12] The result of *these* cases, however, is to thrust an entire 17 month lag solely upon the carriers. Not only must the carriers suffer the entire delay prescribed by statute, but, in filing for increases, they must now risk punitive repayment orders should they fail to sustain the rates for the future. Considering the constant change in evidentiary requirements, that risk is not even subject to evaluation.

Furthermore, according to the Seventh Circuit, the carriers may not even rely upon the historic facts surrounding the shipments to show that the rates actually applied to the past shipments were reasonable.[12a] Rather, the *rate-making* failure-of-proof finding was held to result in recovery, even though there had been neither proof of any injury to the shipper nor proof of *actual* judicial unreasonableness of the charges *when applied*. It is no defense, according to the Circuit, that the *projections*

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[12]Since 1965, of course, the shippers have had a remedy for reparations if the Commission, upon reference, finds particular past charges *affirmatively* unjust and unreasonable. 49 U.S.C. §§304a(2), (5).

[12a]Or, not unreasonable. Compare *United States v. Western Pacific R.R.*, 352 U.S. 59, 1 L. Ed.2d 126, 77 S. Ct. 161 (1956).

of fact involved in the rate-making proceeding were unlike the facts which actually existed when the shipments were being transported under the proposed rates.

The obligations imposed on the carriers *exceed* even a return to the pre-increase level. The court has awarded costs, punitive attorney fees and prejudgment interest running from a date 3 months *prior* to the date on which the rates were cancelled under the I.C.C. order. The carriers are *worse* off than if they had never *sought* an increase. Yet the I.C.C. found that the experience under the increased rates justified even higher rates for the future than those which it concurrently ordered cancelled.

With this unprecedented threat hanging over their collective heads, management and sound business planning by these pervasively regulated carriers is rendered impossible. Monies deemed essential for continued operations cannot be used for in excess of a year or more until the Commission rules upon proposed increases. And if, as here, a critical portion of the proof in the investigation case is rejected upon a technicality, the carriers may not be able to retain the money, even though they may be able to prove that their *actual* expenses exceeded the projected expense level.

To prophesy confiscation as a result is sheer understatement – the result will be devastating to the entire transportation industry and, in turn, to the public which it serves, unless this Court intervenes.

In denying the motor carriers' confiscation and reasonableness defenses, the Circuit resorted to equitable considerations previously expressly rejected by this Court as a predicate for permitting deviation from effective rate levels. Compare the Circuit decision with *Texas & Pac. Ry. v. Mugg*, 202 U.S. 242 (1906); *Gulf, Colo. & Santa Fe Ry. v. Hefley*, 158 U.S. 98 (1895); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963); *Central Ky Nat'l Gas Co. v. R.R. Comm'n*, 290 U.S. 264 (1933); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939), *reh. den.* 308 U.S. 631 (1939); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951). Such estoppels are not available to *private* shippers. *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956).

The Circuit reasoned that the carriers were precluded from contesting the refund requirement further because of the "tacit acceptance" (by withdrawal of petition) of the inchoate refund condition. This argument was reinforced by the holding in the court below that the three-judge court's refusal to annul stood as *res judicata* on the question of the validity of the refund requirement. Normally, validity would be an issue in an enforcement case and *only* contestable *there* when an order for the payment of money is involved. *Interstate Commerce Comm'n v. Atlantic Coast Line R.R.*, 383 U.S. 576 (1966). The court below reasoned that since the three-judge court had declined to annul (for equitable reasons) its action must have been an *affirmance* of the I.C.C. order. Compare *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470 (1952) (F.T.C. affirmed, but enforcement denied); *Shaw Warehouse Co. v. Southern Ry.*, 294 F.2d 850, 851, 852 (5th Cir., 1961), *cert. den.* 369 U.S. 850, *reh. den.* 372 U.S. 950 (1962). And see *United States v. Champlin Refining Co.*, 341 U.S. 290 (1950) and *Champlin Refining Co. v. United States*, 329 U.S. 29 (1946).

Of repeated concern to the court below was the carriers' alleged "agreement" to the refund requirement. In sustaining the summary judgment, the Circuit gave no attention to the counter-affidavits on the issue (S. Appx. 156) and disregarded long-established precedent in this Court that

> . . . the contention made, if adopted, would necessitate the holding that a cause of action in favor of a shipper was from the failure of the carrier to make an agreement, when, *if the agreement had been made* [to deviate from the effective rate levels], both the carrier and the shipper would have been guilty of a criminal offense and *the agreement would have been so completely void as to be impossible of enforcement. Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 445 (1907). (Emphasis added).

See also *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 665-66 (1963); *Hope Natural Gas Co. v. Federal Power Comm'n*, 196 F.2d 803 (4th Cir., 1952). The conflict with the 4th Circuit is shown in *Lynchburg Traffic Bureau v. Smith's Transfer Corp.*, 339 F.2d 478 (4th Cir., 1964).

Having once created a cause of action by the incorporation of §16(2) into Part II,[13] the Circuit encountered yet another difficulty: Section 16(2) makes the findings and order of the I.C.C. only *prima facie* evidence of the facts stated therein. But, the I.C.C. finding was a legislative finding that the rates had not been shown just and reasonable for the future; and the plaintiff was seeking judicial relief on *past* shipments. Nevertheless, the Circuit found that the not shown finding was of conclusive significance and that the finding supported the result reached below. Again, well-established precedent in this Court was disregarded. Compare, for example, one of the most recent pronouncements of this Court:

> *If* the Commission finds that the proposed rates are unreasonable, *rather than* that the railroads failed to carry their burden of proof, that finding *might* be conclusive in a subsequent proceeding. *Atchison Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 37 L. Ed. 2d 350, 365, 41 U.S. L. W. 4905, 4909, at n. 9 (1973) (Emphasis added).

The court below fails to explain *how* the prospective "not shown" finding in a legislative rate-making general revenue investigation related to a post-shipment judicial award of damage. It merely stated that the carriers' failure to file *counter*-affidavits made the "not shown" finding binding, if it were not otherwise conclusive.[14] But, if the historic facts pertaining to the shipments were relevant to damages to be awarded upon those shipments, there was nothing to counter, since the only "evidence" submitted by the shipper related to the failure of proof which in turn related to projections of fact designed to

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[13]Compare §16(2) and §16(12) with §322 on issue of who is *expressly* authorized to bring suit to enforce orders under Part I and Part II.

[14]"Counter" affidavits *were* filed to no avail in almost all related litigation, including more recent cases than these decided by Judge Will, trial judge in these cases, and proof of confiscation and reasonableness was rejected in *Proctor & Gamble Co. v. Ideal Truck Lines*, 355 F. Supp. 547 (W. D. Mo., 1973) and related cases, now 8th Cir. Docket Nos. 73-1200, 1201, 1202.

show only that the rates when applied in the future would be reasonable. The result of the Circuit's rationale is to *equate* a "not shown" finding with an affirmative finding that the rates charged on the particular shipments involved were "unjust and unreasonable when charged in the past". The *latter* finding is *essential* to an award of damages. See *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 249 (1913); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932); *Baer Bros. Mercantile Co. v. Denver & Rio Grande W. R.R.*, 233 U.S. 479, 486-89 (1914); *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654 (1931); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915); *Boston & Maine R.R. v. Hooker*, 233 U.S. 97 (1914); *Davis v. Portland Seed Co.*, 264 U.S. 403 (1924); *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Pennsylvania R.R. v. International Coal Min. Co.*, 230 U.S. 184 (1913); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939), *reh. den.* 308 U.S. 631 (1939). *And see* Judge Learned Hand's decision in *Feinstein v. New York Central R.R.*, 159 F. Supp. 460 (1958).

The rationale of the Circuit thus parlayed two inconclusive determinations (the I.C.C. "not shown" finding and the three-judge court's refusal to annul) into strict liability.

The courts below have supplied the missing rationale for the "equitable considerations" found to exist which, according to the Circuit, warranted the strict liability result. These findings and considerations were wholly absent from the I.C.C. decisions and orders, unsupported by the facts of record below or before the Commission, contradicted by the affidavits below, contrary to the rationale offered by the Commission before the three-judge court in defense of its order, and, as noted *supra*, contrary to the established law. Not only did the I.C.C. urge that its order was not to be construed as a self-executing requirement, but the Commission argued that since it lacked power to order payment, its order was merely a permission to the carriers to settle *if* they had been unjustly enriched. See S. Appx. 78, 79, *et seq.*; S. Appx. 47, *et seq.* The I.C.C. acknowledged that it had not *found* unjust enrichment and

that it did not know whether or not the rates were just and reasonable. Thus, the decision below departs from the time-honored principle that rationale missing in an agency decision should not be supplied by the courts. Cf., *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). The Circuit has permitted the Commission to escape its statutory duty to determine the reasonableness of rates and ratified termination of a case on incomplete evidence when complete evidence was readily available (and would have been produced in defense below, if permitted).

> They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or non-representative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in . . .. The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . .. Statement of former Commissioner Aitchison of the Interstate Commerce Commission frequently quoted, as in *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S. D. N. Y., 1951).

Despite the sound logic of the "balls and strikes" doctrine, the Commission has continued to terminate these important general revenue proceedings with "not shown" findings – and *that* has resulted in an additional multitude of litigation over the years by which shippers are seeking refunds of increased rates neither found reasonable nor unreasonable. For pending cases, see *United States v. Associated Transports, Inc.*, (unreported) (D.D.C., 1972), Civil No. 2003-71, appeal to the D.C. Cir.

No. 72-1946, and related cases; *Ringsby Truck Lines, Inc. v. United States*, 263 F. Supp. 552 (D. Colo., 1967), and related cases; *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir., 1970) and related cases. See also, e.g., *Feinstein v. New York Central R.R.*, 159 F. Supp. 460 (S.D. N.Y., 1958) and related cases; *Interstate Commerce Comm'n v. Inland Waterways Corp.*, 319 U.S. 671 (1943).

The questions posed have not been but should be resolved by this Court. The Commission's order is unique in the history of the Motor Carrier Act. The judicially-announced incorporation of the Part I statutory enforcement cause of action into Part II is unique. But of even greater importance is the manifest violation of the principles of due process: the damages awards were made below *without any test of the actual facts surrounding the shipments* of freight upon which the plaintiff was claiming that it was entitled to a return of a portion of the effective rates.

The disruptive effects of the determinations below extend to infringement upon one of the underlying principles of the Act essential to effective regulation of motor carriers – the uniformity of rates. While to date, hundreds of shippers have claimed against some of the carriers, many others have not. The interest and fee awards by the various courts which have ruled have been almost as varied as the number of decisions. See Appx. A, attached, column (f), The resultant lack of uniformity in the net rates ultimately paid by the shippers is obvious. Compare *Keogh v. Chicago & N.W. R.R.*, *supra.*

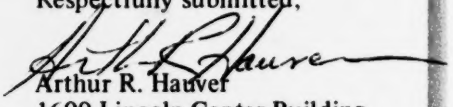
Moreover, the Circuit's action sanctioned lower court judgments beyond and virtually unrelated to the unamended complaints. Even the essential jurisdiction of the lower court under 28 U.S.C. § 1336(a) was unpleaded to support the tenuous cause of action created. Such a travesty as here appears would call for the exercise of this court's powers of supervision even if the other departures "from the accepted and usual course of judicial proceedings" were not so abundant.

CONCLUSION

The Seventh Circuit has decided important questions of federal law which have not been, yet certainly should be, settled by this Honorable Court. Furthermore, the decision below has been decided in a way diametrically contrary to the prior rulings of this Honorable Court. The judicial legislation reaches a result consistently rejected by Congress for 38 years and deprives an entire industry of a fair and impartial judicial test of the relevant historic facts. Exercise of this Court's supervisory function is indicated for the resolution of the conflicting decisions and for resolution of the important questions under the commerce laws pertaining to regulated motor carriers.

WHEREFORE, premises considered, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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October 19, 1973

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	10/9/73 Status (h)
Mueller Co. v. United Buckingham Freight Lines	Cir. Ct., 6th Jud. Distr. Macon County Ill. 70-LM-264	1	1	8	–	–	Process Not Yet Served
Amana Refrigeration, Inc. v. Bruce Transfer (Consol.)	U.S.D.C. No.D. Iowa, Cedar Rapids Div. 70-C-13-CR 70-C-14-CR 71-C-19-CR 71-C-21-CR	4	3	23	Summary Judgment for PS. Costs, Fees (100% of award) 4% Interest from 10/12/71. [unreported]	8th Cir. 73-1507 73-1508 73-1509 73-1510 (Consol.)	Partially Briefed in Circuit.
Liberty Glass Co. v. Arkansas Best Freight Systems, Inc.	U.S.D.C. No.D. Okla. 70-C-187 thru 191	5	1	5	Action To Be Dismissed with Prejudice.	–	Settled.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	10/9/73 Status (h)
Liberty Glass Co. v. Western Gillette Inc.	Dist. Ct. for Creek County, Okla. C-70-140 (Consol.)	14	1	14	Action To Be Dismissed with Prejudice.	–	Settled.
American Crystal Sugar Co. v. Indianhead Truck Lines	U.S.D.C. D. Minn., 4th Div. 4-70 Civil 226	1	1	10	Summary Judgment for P., Costs, Fees, 6% interest from 6/5/69. 351 F.Supp.102 359 F.Supp.741	8th Cir. 73-1580	• Motion to consol. granted. • Opening Briefs due 10/25/73
Land O'Lakes v. United Buckingham Freight Lines, Inc.	U.S.D.C. D. Minn., 4th Div. 4-71 Civil 221 thru 238 & 240	19	1	19	Same	8th Cir. 73-1581	

Container Corp. v. Hart Motor Express, Inc.	U.S.D.C. D. Minn., 4th Div., 4-71 Civil 264	1	2	6	Same	8th Cir. 73-1682	• Appellants are also moving to consol. these cases with all other 8th Cir. cases for argument.
United States v. Admiral-Merchants Motor Freight, Inc.	U.S.D.C. D. Minn., 4th Div. 4-71 Civil 189	1	1	27 (See note 1)	Summary Judgment for P., Costs and interest at 4% from 6/5/69. [unreported]	8th Cir. 73-1670	
United States v. Arkansas Best Freight System, Inc.	U.S.D.C. No.Dist. Tex. Ft.Worth Div. 4-1739	1	1	21	Summary Judgment on liability for P. [unreported] [no opinion]	—	To be tried on issue of damages. (Not yet set).

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	10/9/73 Status (h)
United States v. Burlington Truck Lines, Inc.	U.S.D.C. W.Dist. Mo. W. Div. 19339-4	1	1	12	Judgment for P. Costs & 4% interest from 5/4/71. 356 F.Supp.582	8th Cir. 73-1202	• Consolidated in 8th Cir.
Western Electric Co. v. Burlington Truck Lines, Inc.	U.S.D.C. W.Dist. Mo. W. Div. 18471-4	1	1	10	Judgment for PS. Costs, Fees, 6% interest from 6/25/70. [unreported]	8th Cir. 73-1200	• Opening Brief Filed • On remand to clarify record, Cir. retaining jurisdiction.
Proctor & Gamble Co. v. Ideal Truck Lines	U.S.D.C. W.Dist. Mo. W. Div. 18829-4	1	2	3	Judgment for PS. Costs, Fees, 6% interest from 8/12/70 355 F.Supp.547	8th Cir. 73-1201	

Proctor & Gamble Co. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-258	1	3	32	–	–	Stayed. Stipulated on outcome of P.G.C. appeal (Now in 8th Cir.) At issue.
Proctor & Gamble Co. v. Burlington Truck Lines, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-1012	1	3	2	–	–	Same.
Sweetheart Cup Corp. v. Advance United Expressways, Inc.	U.S.D.C. No.Dist. Ill., No. Div. 71-C-1020 71-C-1021	2	2	48	–	–	Same.
Proctor & Gamble Co. v. Western Trucking Co.	U.S.D.C. E. Dist. Mo. E. Div. 70-C-578(1)	3	1	1	–	–	Same.
Western Electric Co v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1531	1	1	66	–	–	Inactive. Will probably follow outcome Kansas City Western Electric case. (Now in 8th Cir.) At issue.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	10/9/73 Status (h)
Container Corp. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No.D. Ill. E. Div. 71-C-996	1	2	84	Judgment for Ds. [unreported]	7th Cir. 72-1646	Oral argument set 10/25/73.
Montgomery Ward & Co., Inc. v. Anderson Motor Services, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-2019	1	1	33	Transfer of venue from W.D. Mo. 339 F.Supp.713	–	Inactive pending resolution of Container Corp. case immediately above. At issue.
Bemis Co., Inc. v. Burlington Truck Lines, Inc.	U.S.D.C. No.Dist. Ill. E. Div. 70-C-1580	1	5	17	Summary Judgment for Ps. [unreported] fees, but no costs or interest.	7th Cir. 73-1695	Appeal dismissed. Stipulated on outcome of Alcoa cases.

Bemis Co., Inc. v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. D.Minn, 4th Div. 4-70- Civil 237	1	5	32	–	–	Inactive. Probable Trial Court Resolution in Oct.'73. Appeal likely. At issue.
Federal Cartridge Corp. v. Ward Transfer, Inc.	U.S.D.C. D. Minn, 4th Div. 4-71 Civil 247	1	1	1	–	–	Inactive. Probable Trial Court Resolution in Oct.'73. Appeal likely. At issue.
S. S. Kresge Co. v. A & B Transfer, Inc.	U.S.D.C. E. Dist. Mich. So. Div. 34887	1	1	Approx. 200 - (approx. 200 dismissed with prejudice)	Summary Judgment for P. No interest or fees.	6th Cir. 72-1967	Argued 4/9/73 Ready for decision.
Addison Products Corp. v. C. H. Rumpf & Sons	2d Dist. Ct. Michigan 4058-RK 4059-R	2	1	2	–	–	Set for trial 10/26/73

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	10/9/73 Status (h)
American Seating Co. v. Roche Transfer Line	61st Jud. Dist. Ct., Michigan. 51684	1	1	5	–	–	Stipulated on outcome of Kresge (in 6th Cir.)
L. E. Trotter & Assoc. v. Associated Truck Lines, Inc.	U.S.D.C. W. Dist. Mich. So. Div. G 254-71-CA (Consol)	19	1	19	–	–	Inactive. At issue.
Steel Case, Inc. v. Interstate Motor Freight System	61st Jud. Dist., Michigan 50609	1	1	6	–	–	Inactive. At issue.
Bergstrom Paper Co. v. C. W. Transport, Inc.	Dane County Cir. Court, Branch III, II Michigan 131-053 131-054	2	1	3	–	–	Stayed pending resolution of Kresge (now in 6th Cir.)

American Can Co. v. C. W. Transport Inc.	U.S.D.C. W. Dist. Wisc. (Consol.) 70-C-166 thru 174	9	1	9	–	–	Stayed pending resolution of Kresge (now in 6th Cir.)
Brockway Glass Co. v. Jones Truck Lines, Inc.	Muskogee County Dist. Ct., Okla. (Consol.) C-71-267 thru 271	5	1	5	–	–	Trial cont'd indefinitely.
Aluminum Co. of America v. Admiral Merchants Motor Freight, Inc.	U.S.D.C. No. D. Ill., E. Div. (Consol.) 70-C-1189 thru 1200.	11	1	11	Summary Judgments for P. Costs, attorney fees, 6% interest from 6/5/69. 337 F. Supp. 674 337 F. Supp. 683 342 F. Supp. 166	7th Cir. 72-1264 thru 1268 72-1505 thru 1512 (Consol.) (affirming trial court) __F.2d__ 1973 Fed. Carr.Cases ¶84,420 petition for reh. denied (unreported) Attorney fees allowed (unreported)	Petition for certiorari pending.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	10/9/73 Status (h)
Minnesota Mining & Mfg. Co. v. Admiral Merchants Motor Freight Inc.	U.S.D.C. Dist. Minn. 4th Div. 4-71 Civ 221	1	1	21	Summary Judgment on liability for P. 351 F.Supp. 102 359 F.Supp. 741	–	Trial on damages held 7/5/73. Pending resolution. Appeal virtually certain.
Bela Seating Co. v. Advance Transportation Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-2455	1	10	20 (9 to be dismissed)	Prior motions denied. 344 F. Supp. 854	–	Pending on motion for Summary Judgment.
Time, Inc. v. C. W. Transport Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1952	1	1	3	–	–	Pending on motion for Summary Judgment.

Levey Div., Cities Service Co. v. Abel Freight Lines, Inc.	U.S.D.C. No. D. Ill., E. Div. 71-C-1247	1	1	6 (22 dismissed)	Summary Judgment for Ps. Costs Fees and interest from 6/5/69 and later.	–	–
Ceco Corp. v. Admiral-Merchants Motor Freight, Inc.	U.S.D.C. No. D. Ill., E. Div. 71-C-1217	1	1	38	–	–	Active. At issue.
Ryerson & Son, Inc. v. Advance United Expressways, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1213	1	1	28	–	–	• Consolidated.
Ryerson & Son, Inc. v. Arkansas Best Freight System, Inc.	U.S.D.C. No.Dist. Ill. E. Div. 71-C-1334	1	1	7	–	–	• Active. At issue.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	10/9/73 Status (h)
Coca-Cola Co. v. Murphy Motor Freight Lines, Inc.	U.S.D.C. No. Dist. Georgia Atlanta Div. 15144	1	1	24	–	–	Stayed until Dec. 1973. At issue.
Ryerson & Son, Inc. v. Chief Freight Lines, Inc.	U.S.D.C. E. Dist. Mo. E. Div. 71-C-317(2)	1	4	22	Dismissed with prejudice.	–	Settled
United Laboratories, Inc. v. Elgin Storage & Transfer Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1476	1	1	4	Dismissed with prejudice.	–	Settled.
Zenith Radio Corp. v. Be-Mac Transport Co.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1282	1	1	3	Dismissed with prejudice.	–	Settled.

Jones & McKnight Steel, Inc. v. Chief Freight Lines, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1218	1	1	22	Dismissed with prejudice.	–	–
Jones & McKnight Steel, Inc. v. Chief Freight Lines Co.	U.S.D.C. Dist. Minn. 4th Div. 4-71-Civ. 249	1	3	22	Dismissed with prejudice.	–	–
F & B Mfg. Co. v. Be-Mac Transport Co., Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1245	1	1	5	Dismissed with prejudice.	–	–
Kendall Co. v. All American Transport, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1202	1	1	6	–	–	Inactive. Probable settlement. At issue.
Meredith Corp. v. All American Transport, Inc.	U.S.D.C. No. Dist. Iowa Central Div. 11-362-C-2	1	1	14	–	–	Same.

SYNOPSIS OF CASES ARISING OUT OF I.C.C. DOCKET 34971 ORDER

Case Series (Name) (a)	Lower Court & Docket #s (b)	# of Complaints involved (c)	# of Plaintiffs still in (d)	# of Defendants still in (e)	Disposition by Trial Court & Cite (f)	Court of Appeals & Docket #s (g)	10/9/73 Status (h)
Lennox Industries, Inc. v. Western Transp. Co.	Dist. Ct. for Marshall Iowa 31446 thru 31451 & 31683	7	1	7	–	–	Inactive. At issue.
Lennox Industries, Inc. v. Bruce Motor Freight, Inc.	Dist. Ct. for Polk County, Iowa Law Nos. 1173 thru 1175	3	1	3	–	–	Inactive. At issue.
American Home Products Corp. v. A&B Transfer Co., Inc.	U.S.D.C. No. Dist. Ill. E. Div. 70-C-1562	1	8	129	Motion for Summary Judgment denied. [unreported]	–	• Consolidated before same judge.

Abbott Laboratories v. Advance United Expressways, Inc.	U.S.D.C. No. Dist. Ill. E. Div. 71-C-1236	1	39	110	Same	–	• Motion to reconsider, etc. pending.
Appleton Electric Co. v. Advance-United Expressways, Inc.	U.S.D.C. No. D. Ill. E. Div. 70-C-1427	1	1 plus approx 200,000 class members	17 plus approx 1400 class members	Classes defined [unreported] Summary Judgment on liability for Ps [unreported] Order notices to Ds [unreported] Order Discovery of Ps names & addresses [unreported]	7th Cir. 73-1323 (Appeal dismissed without prejudice) [unreported] 72-1201 (petition for Prohibition denied) (unreported) 73-1665 (1292(b) appeal allowed)	• Active in Trial Court. • Motion to add numerous Ps & Ds undecided. • Motions pending. • Interlocutory Appeal Partially Briefed in Circuit

NOTES TO SYNOPSIS

1. Barber Transportation, Inc., an included defendant, on its own behalf only, has filed a motion for rehearing in the District Court. The motion is submitted on affidavits and has been argued. Barber has not yet filed notice of appeal, therefore.

Appendix B (1)

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D.C. 20423

Susp. -47380
March 29, 1968

NOTICE:

Upon petitions for reconsideration of the action of the Board of Suspension in declining to suspend, the entire Commission accepted the case upon referral from Appellate Division 2 and voted today not to suspend but to investigate in Docket No. 34971, *Increased Rates and Charges, From, To and Between Middlewest Territory*, protested schedules naming increases in motor common carrier class and commodity rates, minimum charges per shipments, and other charges including accessorial charges, between points in Middlewest territory, and between points therein *and* points in Central states and southwest territories, published in Supplements 2 and 6 to MF-ICC 541, and in numerous other tariffs of Middlewest Motor Freight Bureau, Agent, Kansas City, Mo., to become effective April 1, 1968, and later; and by order, to set forth procedures as to the nature of the evidence to be required of all parties of interest.

H. NEIL GARSON,
Secretary

SERVICE DATE
APRIL 2, 1968

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 29th day of March, 1968.

NO. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

There being under consideration the matter of increased class and commodity rates and charges, and rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce of shipments within middlewest states, and, between middlewest *and* central and southwest states and Alaska and Canada, as set forth in the following:

MIDDLEWEST MOTOR FREIGHT BUREAU, AGENT
MF-ICC 509:
In SUPPLEMENT 71, ITEM GI-68 except insofar as it would apply in connection with Item 10380 series;

MF-ICC 512:
In SUPPLEMENT 49, ITEM GI-68 except insofar as it would apply in connection with Item 7700 series;

MF-ICC 541:
SUPPLEMENT 2;
SUPPLEMENT 6;

MF-ICC 55:
SUPPLEMENT 42;

or as the same may be amended or reissued;

And all other tariffs, supplements or schedules of the above named agent, not designated in this order, inso-

far as they contain the same provisions or provisions of the same or similar import, or rates and charges incorporating increases the same as, or similar to, those set forth in the aforementioned tariffs or under investigation by reason of this order;

It appearing, That upon consideration of the tariff schedules, and protests thereto, there is reason to institute an investigation to determine whether they result in rates and charges, rules or regulations and practices that are unjust and unreasonable, in violation of the Interstate Commerce Act; and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges, rules, regulations and practices contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said rates, charges, rules, regulations and practices under the Interstate Commerce Act.

And it is further ordered, That the carriers parties to the said schedules, be, and they hereby, made respondents to this proceeding; that copies of this order be served upon the said respondents; and that notice of this proceeding be given the public by posting a copy of this order in the office of the Secretary of the Commission.

By the Commission.

H. NEIL GARSON,
Secretary

(SEAL)

Appendix B (2)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

Service Date

April 4, 1968

Increased Rates and Charges, From, To, and Between Middlewest Territory

Present: Laurence K. Walrath, Commissioner, to whom the matter which is the subject of this order has been referred for action thereon.

It appearing, That by order of the Commission dated March 29, 1968, in the above-entitled proceeding, an investigation was instituted into and concerning the lawfulness of the rates, charges, and regulations contained in the schedules described in said order,

And it further appearing, That in order that consideration be given to all factors which may bear upon a proper determination of the issues, including the question whether the resulting rates would be just and reasonable, it is deemed appropriate in the public interest that the information specified below be included in the record to be developed in this proceeding; and good cause appearing therefor:

It is ordered, That respondents be, and they are hereby, notified and required to submit information and supporting data which shall include, among other things, actual expense and revenue data (including anticipated expense and revenue data to show the effect of the proposed increase or decrease) and operating ratios specifically related to the

traffic and carriers involved, over-all operating ratios, detailed data to establish the representative nature of the carriers used, and in addition, all pertinent evidence and supporting data for the individual representative carriers as they relate to their over-all operations, and specifically to the traffic and territories involved.

It is further ordered, That the Commission will take official notice of all the respondent carriers' financial statements on file with the Commission.

It is further ordered, That the traffic studies to be submitted shall represent the most current period possible, and that they shall be based upon actual operations conducted during identical periods of time for each carrier; that the traffic studies shall be shown to be representative of the traffic covered by the rate proposal; and that the traffic study be costed out and operating ratios determined by the individual weight brackets included within the rate proposal. If the two carrier groups described below under the development of costs are used, the traffic study shall be similarly separated. The revenues and costs for both groups shall also be totaled and operating ratios developed.

It is further ordered, That respondents shall produce evidence showing the total revenue earned for the services performed under the bureau's tariffs here under investigation for the most recent annual reporting period.

It is further ordered, That the cost study shall be based upon the most current annual reporting period adjusted to date. The costs may be developed for those carriers subject to the requirements for allocation of expenses between line haul and pickup and delivery in 49 C. F. R. Part 182, Instructions 27 and 9002, whose total amount of revenue derived under the bureau's tariffs collectively is 75 percent or more of the total revenue derived by all carriers participating in those tariffs. If those instruction 27 car-

riers' revenue is less than 75 percent of the total, then all of the instruction 27 carriers should be used. These study carriers shall be selected from the participating carriers in descending order beginning with the carrier deriving the greatest dollar amount of revenue from those tariffs. Unit costs are to be developed separately for (1) those carriers who earn 50 percent or more of their revenues under the tariffs involved and (2) those carriers who earn less than 50 percent. If factors similar to those published in appendix A to Highway Form B for the above two groups of carriers are not available, the published factors for the applicable territory based on the latest study are acceptable in the development of the unit costs.

It is further ordered, That both the cost study and the traffic study be adequately supported by working papers to permit a complete check of the procedures followed and the results obtained.

It is further ordered, That respondents shall produce evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service. This evidence should include, without limiting the evidence that may be presented, particularized reference to the respondents' reasonable interest, dividend, and surplus requirements; and experienced, projected, and needed rate of return on depreciated investment in transportation.

It is further ordered, That all Class I and II motor carrier respondents shall submit detailed data regarding carrier-affiliate financial and operating relationships and transactions including, with respect to any and all individuals, partnerships, and corporations affiliated with respondents, when such transactions individually or in the

aggregate amount to $2,500 or more during the year 1967, the following information:

1. Name of each affiliate from which respondent, during the year 1967, acquired, leased or purchased lands, buildings, equipment, materials, supplies, parts, tires, tubes, gasoline, oil, or other property or services used by respondent in its operations as a motor common carrier.

2. Kinds of property or service which each affiliate supplies to respondent.

3. Basis of charges for property or services supplied by affiliate to respondent including the base and rate for rental charges.

4. Total charges by each affiliate to respondent during the year 1967 for:

   a. Lease of vehicles.
   b. Lease of terminals.
   c. Lease of other property.
   d. Pickup and delivery of shipments.
   e. Repair and servicing of vehicles.
   f. Management, accounting, financial legal, purchasing, or traffic solicitation services.
   g. Property sold by affiliate to respondent.

5. If the affiliate derives revenue from the sale or lease of property or from services through transactions with persons other than respondent, indicate the percentage of the revenue of such business to the total revenue of the affiliate in the year 1967.

6. A copy of the income statement for each affiliate for the year 1967 and the latest period of 1968 for which an income statement is available.

7. A statement listing the amount of wages, salaries, bonuses, and other compensation paid by the affiliate in 1967 to any individual who is also a respondent or an officer, director or substantial stockholder of a respondent; or the wife or close relative of a respondent or officer, director or substantial stockholder of a respondent.

8. The term "affiliate" as used in this order means:
   a. Any individual who is also a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent, or of an officer, director, or substantial stockholder of a respondent.
   b. Any partnership in which one of the partners is a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent; or of an officer, director, or substantial stockholder of a respondent.
   c. Any corporation whose stock is wholly or partly owned by a respondent; by an officer, director, or substantial stockholder of a respondent; or by the wife or close relative either of a respondent or of an officer, director, or substantial stockholder of a respondent.
   d. Any corporation which exercises control over the operations or finances of respondent.

It is further ordered, That all of the required data specified in this order shall be based upon and reflect at least the 1967 annual reporting period.

It is further ordered, That the Department of Transportation and the General Services Administration be, and they are hereby, notified and requested to submit, as part of their presentation, evidence which will (1) adequately support the allegations contained in their protests before the Board of Suspension including data showing the productivity of respondents, any increase in such productivity for at least the calendar year 1967, and the labor costs per unit of productivity; (2) show what financial indicators should be considered by the Commission in making its decision in this proceeding; (3) show to what extent the Commission should consider operating ratios, return on invested capital, and rate of return on stockholders' equity,

in determining the revenue needs of respondents recognizing the differences which exist among the individual carriers both as to their financial conditions and their methods of operation; and, (4) should the Commission adopt any of these as criteria, show what percentage or percentages should the motor carrier industry be allowed in order to maintain a healthy financial condition.

It is further ordered, That the detailed information called for by this order shall be in writing and shall be verified by a person or persons having knowledge thereof; that such verified material shall be served on all parties of record on or before May 6, 1968, and at the same time, respondents shall file an executed original and 16 copies with this Commission, together with certificates of service in accordance with rule 1.22(a) of the General Rules of Practice. The information with respect to carrier affiliates may be served on the parties in summary form, if so desired.

It is further ordered, That all underlying data used in preparation of the material outlined above shall be made available in the office of the party serving such verified matter during usual office hours for inspection by any party of record desiring to do so; and that the underlying data shall be made available also at the hearing, but only if and to the extent specifically requested in writing and required by any party for the purpose of cross-examination.

It is further ordered, That anyone desiring to become a party of record to receive copies of the verified material of respondents to be filed in accordance with the procedure set forth above, must notify the Commission, in writing, on or before April 18, 1968. As soon as practicable after such date, a service list of all parties of record will be prepared and served by the Commission. Otherwise, any interested person desiring to participate in this proceeding may make his appearance at the hearing.

It is further ordered, That this proceeding be, and it is hereby, referred to Hearing Examiners Robert N. Burchmore and Richard McG. Wilkins for hearing commencing on May 20, 1968, at 9:30 o'clock a.m. District of Columbia Daylight Saving Time at the offices of the Interstate Commerce Commission, Washington, D. C.

It is further ordered, That this proceeding will not be the subject of an examiner's recommended report and order because due and timely execution of our functions requires an expedited decision and in addition, if the increases involved herein are not approved in their entirety, the shippers will be paying higher rates without any recourse to this Commission for relief.

It is further ordered, That a copy of this order be delivered to the Director, Division of Federal Register, for publication in the Federal Register as notice to all interested persons.

And it is further ordered, That, to avoid future unnecessary service upon those respondents, who, although participating carriers in the tariff schedules which are the subject of investigation herein, are not actively interested in the outcome of such investigation, subsequent service on respondents herein of notices and orders of the Commission will be limited to those respondents who:

(1) specifically make written request to the Secretary of the Commission to be included on the service list, or

(2) have appeared at a hearing.

Dated at Washington, D. C., this 3rd day of April, 1968.

By the Commission, Commissioner, Walrath.

H. Neil Garson

(Seal)

Secretary

Appendix B (3)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 25th day of April, 1968.

No. 34971

Increased Rates and Charges, From, To, and Between Middlewest Territory

It appearing, That by order of the Commission dated March 29, 1968, in the above-entitled proceeding, an investigation was instituted into and concerning the lawfulness of the rates, charges, and regulations contained in the schedules described in said order:

It further appearing, That by order dated April 3, 1968, the Commission, among other things, directed the procedure which is to be followed in the above-entitled proceeding and required the submission of certain information and supporting data for the record on or before May 6, 1968, and scheduled the hearing to commence on May 20, 1968;

It further appearing, That by petition filed April 16, 1968, the Department of Transportation requests that the Commission order respondents to produce certain studies and underlying data prepared by Planning Research Corp., Midwest Research Institute and Pacific Research Corp.;

And it further appearing, That by request of April 12, 1968, the Department of Transportation and the General Services Administration requests that the procedural dates set forth in the order of April 3, 1968 be postponed for 90 days; and by letter dated April 22, 1968, respondents request that the time for filing and service of the information and data be extended to August 5, 1968, the hearing postponed to August 19, 1968, and that the hearing location be changed to Kansas City;

It is ordered, That the petition seeking the production of certain studies be, and, it is hereby denied, because the studies requested are not in the possession of respondents nor are they available to them;

It is further ordered, That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and, it is hereby postponed to August 19, 1968, conditioned upon respondents compliance with the refund provision ordered below; and that in all other respects, the Commission's order of April 3, 1968, remains in full force and effect (a decision will be made later as to the place of hearing);

And it is further ordered, That respondents be, and, they are hereby, ordered to make refunds to the shippers on any shipments moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission.

By the Commission.

/s/ H. Neil Garson
H. Neil Garson

(Seal) *Secretary*

Appendix B (4)

Served June 13, 1969

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

Decided June 5, 1969

Increased motor common carrier class and commodity rates and charges, between points in middle western territory and between points in that territory and points in Illinois, Central States and southwestern territories, and Alaska and Canada, found not shown to be just and reasonable. Schedules ordered canceled, refunds required and proceeding discontinued.

John S. Fessenden, Andrew N. Happer, J. D. Lawson, George D. Michalson, and Roland Rice for respondents.

John M. Agrey, S. W. W. Carr, John A. DuPont, J. I. Finsness, Gordon Ganka, Clarence D. Smith, E. J. Hanson, John J. C. Martin, Marvin H. Morse, Stanford G. Ross, Jeffrey N. Shane, Leonard M. Shinn, Eugene P. Springer, and Gleen F. Wilman for protestants.

REPORT AND ORDER OF THE COMMISSION

By the Commission:

By schedules which became effective on April 1, 1968, the motor common carriers, hereinafter called respondents, participating in tariffs published by the Middlewest Motor Freight Bureau, Inc. (hereinafter called the Bureau), established increased class and commodity truckload and less-than-truckload rates and charges, for application between points in middle western territory and between points in that territory and points in Illinois, Central States, and southwestern territories, and Alaska and Canada. Upon protests by various parties,[1] by order of March 29, 1968, we instituted an investigation, without suspension, into the lawfulness on the proposed schedules. The rates under investigation will be referred to herein as the proposed rates, and the rates in effect prior to April 1, 1968, will be referred to as the present rates.

By order of April 3, 1968, the proceeding was set for hearing on May 20, 1968, special procedures were prescribed and certain information was called for (see appendix A). The order also provided that the proceeding would not be the subject of an examiners' recommended report and order because the circumstances required an expedited decision. After the order was served, there were requests both from respondents and certain protestants for

1. The protestants who participated in the hearing were: The Drug and Toilet Preparation Traffic Conference; the Chamber of Commerce of Lincoln, Nebr.; the Traffic Bureau of Sioux Falls, S. Dak.; the Chambers of Commerce of Fargo and Grand Forks, N. Dak.; the North Dakota Public Service Commission; the Public Utilities Commission of the State of South Dakota; the United States Department of Transportation; and the General Services Administration (on behalf of executive agencies except the Department of Defense).

postponement of the hearing date. The hearing was postponed to August 19, 1968, by order of April 25, 1968, conditioned upon respondents' compliance with an order to make refunds on shipments after May 20 to the extent the increases were not approved.

After oral hearing, briefs were received from respondents and from the Department of Transportation (DOT), the General Services Administration (GSA), the Drug and Toilet Preparation Traffic Conference, and jointly from the Nebraska State Railway Commission and Lincoln Chamber of Commerce. DOT and the Traffic Conference take exception to rulings of the hearing examiners refusing to exclude from the record certain of respondents' exhibits which were served upon the parties by fourth-class mail rather than by first-class mail as required by rule 22 of our General Rules of Practice. The rulings are affirmed for the reason that the cited rule is not necessarily exclusionary in purpose or effect; appropriate relief for any delay caused by use of fourth-class mail, such as a grant of time to prepare their cross-examination, was not requested by the protestants. However, the respondents are admonished that such evasion of the service requirements wil not be tolerated in the future. The Traffic Conference excepts without argument to certain other evidentiary rulings. Examination of the entire record reveals no prejudice to the rights of the parties and no substantial error in the rulings of the examiners, which are therefore affirmed.

The adjustment here proposed consists of an increase of 5 percent in rates and charges applicable to shipments weighing less than 5,000 pounds and 3 percent in rates and charges applicable to shipments weighing 5,000 pounds or more. Not all of the Bureau's tariffs are under investigation.

Section 216(g) of the act imposes on respondents the

burden of showing the proposed rates to be just and reasonable. The sole justification offered by respondents for the proposal is their alleged need for additional revenues. They characterize the proposal as "the familiar type of across the board territorial revenue adjustment." The issues which they recognize are (1) whether the anticipated additional revenues are needed by the carriers, and (2) whether the carriers have been operated honestly, efficiently, and economically.[2] Respondents claim that they need additional revenues to meet anticipated increased costs resulting from higher wage rates and to improve the general financial condition which, they claim, the results of past operations indicate they must do.

Increased costs.—Respondents contend that their proposal is fully justified by increases in expenses which resulted from new wage rates effective April 1, 1968. They introduced cost and traffic studies for selected groups of carriers, which studies purport to show the effect which the increased expenses would have upon the carriers' profit margins, as reflected in operating ratios. However, the entire presentation is based upon a restatement of the carriers' 1967 expenses at the anticipated 1968 wage level,

2. Section 216(i) of the Interstate Commerce Act (referred to by respondents on brief) provides that, "In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transportation of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

and respondents failed to show either the amount of the wage rates or the process by which their expenses were restated to reflect such rates. Respondents' cost witness made the statement that total expenses had been restated to reflect the higher wage rates and that the resulting increase was 3.8 percent. But the witness had not been responsible for the restatement, which was made on an individual basis by certain member carriers, not fully identified on the record. Some of the individual statements were tendered as exhibits but were withdrawn because no witness could stand cross-examination concerning them. Respondents clearly failed to produce substantial compliance with the first paragraph of the order for proofs (appendix A) to the extent that it called for "anticipated expense and revenue data to show the effect of the proposed increase."

We take official notice of a second round of wage increases, effective April 1, 1968, under a National Teamsters Union contract, the first round having taken effect 1 year earlier. Such increased wage rates have been the subject of evidence presented to us in our investigations of proposed motor carrier rate increases in other territories. However, the effect of such wage rates upon the total expenses and unit costs of the carriers is not measurable without more information than the mere fact of the new wage rates. A reliable restatement of expenses is essential to any cost justification of increased freight rates. We recently (February 14, 1969) found not justified one territorial rate increase because the restatement of expenses which was offered in that case was not sufficiently representative and reliable. *General Increase, Middle Atlantic and New England*, called the *Middle Atlantic* case, 332 I. C. C. 820, 834-5. In the proceeding now before us the restatement has not been presented for our examination, and it is impossible for us to say what net effect, if any, the new wage rates

will have on the carriers' profit margins. The respondents have failed to show increased costs sufficient to justify their proposals in whole or in part.

While the foregoing conclusions render unnecessary a detailed analysis of respondents' cost and traffic studies, the nature of their presentation requires additional comment. Respondents used the studies to compare 1967 operating ratios with those ratios which would have obtained on 1967 traffic at the anticipated 1968 level of expenses, the projected ratios being shown at both present and proposed rate levels. The showing is summarized as follows:

Operating ratios for study carriers for years 1967 and 1968

Operating ratio based upon (1)	Shipments weighing less than 5,000 pounds (2)	Shipments weighing 5,000 pounds or more (3)	All affected traffic (4)
	Percent	*Percent*	*Percent*
Present rates and actual 1967 expenses	97.3	87.6	94.0
Present rates and projected 1968 expenses	101.3	90.3	97.5
Proposed rates and projected 1968 expenses	96.4	87.7	93.5

Even if accepted, respondents' showing suggests on its face that the proposed increase is out of line on shipments weighing 5,000 pounds or more. This is so because the proposed increase on such shipments, produces a profit margin reflected by present and proposed operating ratios of 87.6 and 87.7, while shipments under 5,000 pounds are so rated as to produce an operating ratio of 96.4, and indicate that the latter category is not bearing its fair share of total carrier costs. *Middle Atlantic* case, *supra*, page 830. Moreover, respondents' study shows that the effect of continuing

the present rates at 1968 cost levels on shipments over 5,000 pounds would be to produce a 90.3 operating ratio on such traffic. Respondents offer no evidence indicating that a ratio of 90.3 reflects a gross profit margin that is too low.

Respondents' financial condition.—Respondents contend that the financial results of their past operations show that they are badly in need of additional revenues. To develop such a showing, they submitted a 7-year financial study of all 142 class I and class II resident members of the Bureau.[3] They also offered the opinion testimony of a consulting transportation economist, a banker, and an investment banker. They assert that motor carriers need revenues sufficient to provide (1) for 4-percent annual growth of undepreciated plant, (2) for the effects of inflation in replacing old assets with new in the amount of 3 percent of book cost of undepreciated plant annually, and (3) for dividends at the rate of 7 percent of net worth. Their cost witness presented an analysis of the 7-year finances giving effect to those assumptions, and "required" additional revenues were constructed from the analysis. This presentation constitutes respondents' attempt to comply with that portion of the order for proofs (appendix A) which calls for "evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service." Respondents on brief characterize the quoted requirement as the "most significant" part of the order, being directed to the revenue need which "is the real heart of this case."

The essence of respondents' method of synthesizing their claimed revenue needs for 1967 is revealed in the following

3. Class I carriers are those having annual gross revenues exceeding $1 million; class II carriers, exceeding $300,000. Resident members are those performing through service under the tariffs in issue.

table, which is taken from their exhibit and which deals with those carriers who derive 75 percent or more from the tariffs in issue.

Respondents' constructive 1967 revenue needs for 19 carriers deriving 75 percent or more of their revenues from issues tariffs

Line No.	Item	Source	Amount (000)
	Financial data:		
1	Working capital	Annual report (AR)	$ 3,569
2	Carrier operating property	AR	47,908
3	Gross investment	lines 1 and 2	51,477
4	Long-term debt	AR	15,991
5	Total net worth	AR	17,679
6	Interest expense	AR	909
7	Rate of interest	line 6 ÷ 4	5.7%
8	Net deductions (includes interest)	AR	715
9	Total operating expense	AR	113,106
	Constructive revenue need:		
10	Growth (1)	4 percent of line 3	2,059
11	Debt portion	½ of line 10	1,029
12	Equity portion	½ of line 10	1,029
13	Inflation (2)	3 percent of line 3	1,544
14	Yield (3) (dividends)	7 percent of line 5	1,238
15	Net income after taxes	lines 12, 13, and 14	3,811
16	Net income before taxes	line 15 ÷ .55	6,929
17	Interest on debt growth	lines 7 X 11	59
18	Net operating income need	lines 8, 16, and 17	7,703
19	Revenue needed	lines 9 and 18	120,809

Source.—Exhibit 27, appendix D, page 3, column 8

(1, (2), and (3) relate to correspondingly numbered items in text, above.

As shown in the above table, respondents in effect contend that the study carriers needed 1967 revenues of $120,809,000, whereas, as shown in appendix B hereto, their actual revenues were only $115,619,000. Respondents' study likewise constructs deficiencies for each previous year to and including 1963 (see appendix B). But examination of the synthesis compels the conclusion that the claimed need for additional revenues is untenable. The claimed revenue need includes, in line 12 of the above table, $1,029,000 as the equity portion of a 4-percent annual growth in gross investment, and the amount claimed constitutes the equity

itself rather than a return on investment sufficient to attract equity capital. The method is in sharp contrast with the treatment of the debt portion of growth, as to which respondents claim only the amount necessary to pay interest on the increased debt. There is no basis upon which we could fairly conclude that the rate paying public should supply the respondents' growth equity capital; and we reject the proposition. In this connection, it should be noted that the amount of the claimed equity portion of growth constitutes 27 percent of the total claim for net after tax income (above table, line 15 ÷ 12).

More than 40 percent of the claimed after-tax net income is based upon the proposition that respondents need revenues sufficient to provide for 3-percent annual inflation in the cost of replacing old equipment with new. However, the 3-percent annual inflation rate was applied to the gross investment, which includes cash and other working capital and depreciation reserves. This merely repeats in a different form the contention that the shippers should supply investment dollars, and would improperly impose a future cost on current rate payers. The record does not afford a basis for approving a claimed revenue need. Moreover, the inflation item includes the debt financed portion of gross investment, whereas the servicing of that debt is already recompensed by the item of net deductions.

The reasons stated above are not exhaustive but they require the conclusion that respondents' synthesis of revenue needs has not been justified.

Return on investment.—The single most important gauge of a motor carrier's ability to attract equity capital is its return of value over and above the values the investors have committed to the enterprise. Two significant measures are the rate of return on stockholders' investment, and the rate of return on assets. Accordingly, our order for

proofs (appendix A) called for "experienced, projected, and needed rate of return on depreciated investment in transportation" and for "dividend and surplus" requirements.

The revenues of the carrier group are examined in appendix B on the basis of the resulting return of after-tax net income in relation to net worth. As there indicated, respondents represent that the returns of after-tax net income on shareholders' equity ranged from 5.6 to 19.1 percent in the period 1963 through 1967, for the group of carriers deriving their revenues over 75 percent from the tariffs in issue. However, those ratios are based on shareholders' equity at yearend which in each year was greater than at the beginning of the year; a closer approach to the return on the equity for the actual period of operation is reached by taking the average of the equity at the beginning and end of the year. *Middle Atlantic* case, *supra*, page 844, footnote. 1.

Also, respondents introduced a study of affiliate data which indicates that the profits of affiliates which they attribute to the carriers are equivalent to a reduction of half a point in the study carriers' operating ratios. Absent more information on affiliates, an approach to the ascertainment of the effect of affiliates' profits on carrier returns would be to reduce carrier expenses by half a percentage point, and the appendix includes such an adjustment. The range of actual after-tax return on equity becomes 9.2 to 24.8, when such adjustments have been made.[4]

Appendix B also shows that the revenues claimed by respondents to have been required would have produced

4. Such adjustment gives no consideration to the net worth of the affiliates which is not included in the net worth of the reporting carriers, or to the fact that the affiliates' profits are before taxes; the effect of those items cannot be ascertained on this record.

net income after taxes ranging from 22.6 to 27.7 percent of net worth, those ratios ignoring the effect of affiliates. In this connection, respondents' cost witness projected the ratios as ranging from 9.9 to 11 percent, but those ratios are invalid because they relate revenue needs based on actual net worth to a hypothetical net worth calculated at 3.5 times the claimed revenues. The inevitable result was to understate the ratio, and the amount of the understatement is indicated by the adjusted ratios above.

Respondents offered no showing as to the return on their rate base, although the order for proofs called for evidence as to the "needed rate of return on depreciated investment in transportation." However, the proffered financial history reveals their net investment (working capital plus depreciated carrier operating property), which approaches the appropriate rate base. In the following table (extracted from respondents' exhibit 27, appendix D) the average of such net investment at the beginning and end of each year is shown with the return of net income before interest and income taxes, as experienced and as sought. (In this table the increase in return due to affiliate operations, if any, is ignored.)

Ratio of net income before income taxes and interest to rate base of carriers which derived 75 percent or more of their revenues from issue tariffs.

Year	Rate base	Net income before taxes and interest[1]		Rate of return	
		Actual	Sought	Actual	Sought
		(000)	*(000)*	*Percent*	*Percent*
1963	$17,542	[2]$1,345	$5,325	[2]7.7	30.4
1964	19,327	3,995	5,796	20.7	30.0
1965	21,721	3,460	6,441	15.9	29.6
1966	27,451	4,007	7,285	14.6	26.6
1967	29,372	2,707	7,838	9.2	26.7

1. Amount reported for net income before income taxes plus amount reported for interest.

2. Reported net income before taxes was less than after taxes.

This record does not furnish sufficient information to ascertain what is a reasonable return on a rate base for these motor common carrier respondents. However, we hold that no justification has been shown for a return of more than 25 percent on the rate base, as claimed.

In only 1 recent year has the composite return on equity of the study carriers been less than 14.9 percent: In 1967 it was 9.2 percent. All the evidence indicates that 1967 was not a typical year. One of respondents' witnesses testified that 1967 was not a representative year because of unusual strikes that occurred. A witness for DOT testified that there was a drop in tons and ton-miles in 1967 which adversely affected productivity. Respondents' financial studies show that their profit margins improved substantially in the first quarter of 1968 as compared with the first quarter of 1967 (operating ratios of the 75-percent group went from 100 to 97.5) and this improvement took place prior to the effectiveness of either the proposed rates or the increased wages. Yet respondents offered no evidence or estimates as to traffic volume, past or prospective. Their projections simply assume 1968 traffic at the 1967 level. The record as a whole clearly precludes any approval of the proposals on the basis of the decline in earnings for 1967; furthermore, the evidence as to the earnings and financial condition of the respondents does not constitute a convincing showing of a need for higher rates.

The section 216(i) standards, which is set forth above, requires us to consider not only the need of the carriers for sufficient revenues but also the public need for adequate service at the lowest cost consistent therewith. The meeting point of those needs is sharpened at the present time by heightened dangers of inflation. It is not, therefore, enough to make an easy assumption that respondents' costs have gone up and that higher rates are warranted thereby. Our

duty requires closer examination and verification of alleged expenses, and ascertainment of their net effect, if any. This record does not afford sufficient information to perform that duty.

Carrier efficiency.—One other matter requires comment. Respondents called over 60 witnesses from individual carriers to testify generally to the practices followed and the improvements made for the purpose of increasing efficiency and reducing costs. The testimony is more impressive than that offered in a number of previous cases, and it is convincing as to the efforts made by these carriers to improve efficiency of operations. However, as above indicated, respondents have failed to present a sufficient showing with regard to the effect of the wage increase upon total expenses and unit costs of the carriers.

Ultimate Findings and Order

We find that the proposed increases have not been shown to be just and reasonable.

Commissioner Tuggle concurred in the result.

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel on or before July 21, 1969, the schedules described in the order entered herein on March 29, 1968, upon not less than 1 day's notice to the Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act.

It is further ordered, That, in accordance with the order entered herein on April 25, 1968, the respondent' be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent

that such charges included the increases herein found not shown to be just and reasonable.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

H. Neil Garson
Secretary

(Seal)

APPENDIX A

Excerpt from Commission's order of April 3, 1968, showing what information was sought therein.

It is ordered, That respondents be, and they are hereby, notified and required to submit information and supporting data which shall include, among other things, actual expense and revenue data (including anticipated expense and revenue data to show the effect of the proposed increase or decrease) and operating ratios specifically related to the traffic and carriers involved, overall operating ratios, detailed data to establish the representative nature of the carriers used, and in addition, all pertinent evidence and supporting data for the individual representative carriers as they relate to their overall operations, and specifically to the traffic and territories involved.

It is further ordered, That the Commission will take official notice of all the respondent carriers' financial statements on file with the Commission.

It is further ordered, That the traffic studies to be submitted shall represent the most current period possible, and that they shall be based upon actual operations conducted during identical periods of time for each carrier; that the traffic studies shall be shown to be representative of the traffic covered by the rate proposal; and that the

traffic study be costed out and operating ratios determined by the individual weight brackets included within the rate proposal. If the two carrier groups described below under the development of costs are used, the traffic study shall be similarly separated. The revenues and costs for both groups shall also be totaled and operating ratios developed.

It is further ordered, That respondents shall produce evidence showing the total revenue earned for the services performed under the bureau's tariffs here under investigation for the most recent annual reporting period.

It is further ordered, That the cost study shall be based upon the most current annual reporting period adjusted to date. The costs may be developed for those carriers subject to the requirements for allocation of expenses between line haul and pickup and delivery in 49 CFR part 182, instructions 27 and 9002, whose total amount of revenue derived under the bureau's tariffs collectively is 75 percent or more of the total revenue derived by all carriers participating in those tariffs. If those instruction-27 carriers' revenue is less than 75 percent of the total, then all of the instruction-27 carriers should be used. These study carriers shall be selected from the participating carriers in descending order beginning with the carrier deriving the greatest dollar amount of revenue from those tariffs. Unit costs are to be developed separately for (1) those carriers who earn 50 percent or more of their revenues under the tariffs involved, and (2) those carriers who earn less than 50 percent. If factors similar to those published in appendix A to Highway Form B for the above two groups of carriers are not available, the published factors for the applicable territory based on the latest study are acceptable in the development of the unit costs.

It is further ordered, That both the cost study and the traffic study be adequately supported by working papers

to permit a complete check of the procedures followed and the results obtained.

It is further ordered, **That respondents shall produce evidence of the sum of money, in addition to operating expenses, needed to attract debt and equity capital which they require to insure financial stability and the capacity to render service. This evidence should include, without limiting the evidence that may be presented, particularized reference to the respondents' reasonable interest, dividend, and surplus requirements and experienced, projected, and needed rate of return on depreciated investment in transportation.**

It is further ordered, That all class I and class II motor carrier respondents shall submit detailed data regarding carrier-affiliate financial and operating relationships and transactions including, with respect to any and all individuals, partnerships, and corporations affiliated with respondents, when such transactions individually or in the aggregate amount to $2,500 or more during the year 1967, the following information:

1. Name of each affiliate from which respondent, during the year 1967, acquired, leased or purchased lands, buildings, equipment, materials, supplies, parts, tires, tubes, gasoline, oil, or other property or services used by respondent in its operations as a motor common carrier.
2. Kinds of property or service which each affiliate supplies to respondent.
3. Basis of charges for property or services supplied by affidavit to respondent including the base and rate for rental charges.
4. Total charges by each affiliate to respondent during the year 1967 for:
   a. Lease of vehicles.

b. Lease of terminals.
c. Lease of other property.
d. Pickup and delivery of shipments.
e. Repair and servicing of vehicles.
f. Management, accounting, financial, legal, purchasing, or traffic solicitation services.
g. Property sold by affiliate to respondent.

5. If the affiliate derives revenue from the sale or lease of property or from service through transactions with persons other than respondent, indcate the percentage of the revenue of such business to the total revenue of the affiliate in the year 1967.

6. A copy of the income statement for each affiliate for the year 1967 and the latest period of 1968 for which an income statement is available.

7. A statement listing the amount of wages, salaries, bonuses, and other compensation paid by the affiliate in 1967 to any individual who is also a respondent or an officer, director or substantial stockholder of a respondent; or the wife or close relative of a respondent or officer, director or substantial stockholder of a respondent.

8. The term "affiliate" as used in this order means:

a. Any individual who is also a respondent; an officer, director, or substantial stockholder of a respondent, or the wife or close relative either of a respondent, or of an officer, director, or substantial stockholder of a respondent.
b. Any partnership in which one of the partners is a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent; or of an officer, director, or substantial stockholder of a respondent.
c. Any corporation whose stock is wholly or partly owned by a respondent; by an officer, director, or substantial stockholder of a respondent; or by the

wife or close relative either of a respondent or of an officer, director, or substantial stockholder of a respondent.

d. Any corporation which exercises control over the operations or finances of respondent.

It is further ordered, That all of the required data specified in this order shall be based upon and reflect at least 1967 annual reporting period.

It is further ordered, That the Department of Transportation and the General Services Administration be, and they are hereby, notified and requested to submit, as part of their presentation, evidence which will (1) adequately support the allegations contained in their protests before the Board of Suspension including data showing the productivity of respondents, any increase in such productivity for at least the calendar year 1967, and the labor costs per unit of productivity; (2) show what financial indicators should be considered by the Commission in making its decision in this proceeding; (3) show to what extent the Commission should consider operating ratios, return on invested capital, and rate of return on stockholders' equity, in determining the revenue needs of respondents recognizing the differences which exist among the individual carriers both as to their financial conditions and their methods of operation; and (4) should the Commission adopt any of these as criteria, show what percentage or percentages should the motor carrier industry be allowed in order to maintain a healthy financial condition.

Appendix B (5)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

Service Date

September 9, 1969

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 29th day of August, 1969.

No. 34971

Increased Rates and Charges, from, to and Between Middlewest Territory

Upon consideration of the record in this proceeding; the Commission's decision of June 5, 1969 (335 I. C. C. 142) requiring cancellation of the involved general rate increase and directing respondents, in accordance with an order herein of April 25, 1968, to refund to shippers increased rates collected on shipments moving after May 20, 1968; and the petition of respondents to vacate that portion of the order of June 5, 1969, requiring refund payments to shippers and request therein for reconsideration and/or reopening for further hearing filed on July 14, 1969; and the replies thereto filed by protestants Traffic Bureau of Sioux Falls on July 23, 1969, General Services Administration on August 4, 1969, jointly by Nebraska State Railway Commission and Lincoln Chamber of Commerce on August 4, 1969, jointly by Grand Forks Chamber of Commerce,

Chamber of Commerce of Fargo, and Public Service Commission, State of North Dakota, on August 11, 1969, Department of Transportation on August 18, 1969, and jointly by Drug and Toilet Preparation Conference and The National Small Shipments Traffic Conference, Inc., on August 18, 1969; and therefore:

It is ordered, That the petition be, and it is hereby, denied for the reason that sufficient grounds have not been presented to warrant granting the action sought; and that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.

By the Commission.

/s/ Andrew Anthony, Jr.
Andrew Anthony, Jr.
Acting Secretary

(Seal)

Appendix B (6)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

ORDER

Service Date November 6, 1969

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of October ...., 1969.

No. 34971

Increased Rates and Charges, from, to and Between Middlewest Territory

Upon further consideration of the record in this proceeding, including the Commission's decision of June 5, 1969 (335 I. C. C. 142) requiring cancellation of the involved general rate increase and directing respondents in accordance with an order herein of April 25, 1968, to refund to shippers increased rates collected on shipments moving during the specified refund period; and the order of August 29, 1969 denying prior petitions for reconsideration and vacation of the refund provision; and

It appearing, That on October 9, 1969, a petition for reconsideration of the decision as affirmed by the above-indicated denial order was filed by the respondents on the grounds that the instant petition is not successive but

properly lies because a new basis therefor has arisen by virtue of the Commission's decision in Ex Parte No. 249 (Sub-No. 1), *Informal Procedure for* Determining Reparation, 335 I. C. C. 403 (decided September 5 and served September 18, 1969);

And it further appearing, That a petition was also filed on October 9, 1969, by the Drug and Toilet Preparation Traffic Conference, Inc. (hereinafter referred to as the Conferences), seeking reconsideration solely of the said denial order of August 29, 1969, because it allegedly altered the method of refund payment from that set forth in the decision of June 5, 1969; wherefore:

It is ordered, That the respondents' petition be, and it is hereby, denied, because Ex Parte 249 (Sub-No. 1) is not relevant to the instant situation, wherein respondents had the burden of proving the lawfulness of the general increases.

And it is further ordered, That the Conferences' petition be, and it is hereby, denied, because the order of August 29, 1969, did not change the liability for making refunds, previously determined, but appropriately placed the burden for supporting claims for refunds upon the shippers who paid the charges.

By the Commission. .

H. Neil Garson
Secretary

(Seal)

Appendix B (7)

30459

INTERSTATE COMMERCE COMMISSION

No. 34971

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY

9485

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 18th day of June, 1970.

George M. Stafford,
Dale W. Hardin,
Kenneth H. Tuggle,
Rupert L. Murphy,
Laurence K. Walrath,
John W. Bush, Commissioners.
Virginia Mae Brown,
Willard Deason,
Donald L. Jackson,
Robert C. Gresham,

—0—

Admiral-Merchants Motor Freight v. *United States*,
C. A. No. C-2030 (D. Colo.)
(G.C. Memo No. 140-70)

INCREASED RATES AND CHARGES, FROM, TO AND BETWEEN MIDDLEWEST TERRITORY—No. 34971, 335 I.C.C. 142 (1969)

Voted to authorize the General Counsel to state to the district court in a motion to dismiss the action (Civil Action No. C-2030) or other appropriate pleading, that

the true basis of the shippers' right to a refund is their common law remedy for restitution, and further authorize the General Counsel to advise the Commission's staff accordingly as a guide in answering correspondence and other inquiries from shippers; Commissioners Tuggle, Murphy, and Walrath voting in the negative; Commissioners Bush, Jackson, and Gresham not participating.

Commissioner Tuggle suggested a defense to which Commissioners Murphy and Walrath agreed.

Appendix C (1)

IN THE UNITED STATES DISTRICT COURT
For the District of Colorado

Civil Action No. C-2030

Admiral-Merchants Motor Freight, Inc., Advance-United Expressways, Inc., All-American Transport, Inc., Badger Freightways, Inc., Barber Transportation Co., Bee Line Motor Freight, Brady Motorfrate, Inc., Briggs Transportation Co., Bruce Motor Freight, Inc., Burlington Truck Lines, Inc., Byers Transportation Company, Inc., C W Transport, Inc., Campbell "Sixty-Six" Express, Inc., Capitol Truck Lines, Inc., Cassell Truck Lines, Inc., Century Motor Freight, Inc., Chicago Kansas City Freight Line, Inc., Chippewa Motor Freight, Inc., Churchill Truck Lines, Inc., Clairmont Transfer Co., Crouch Bros., Inc., Crouse Cartage Company, Darling Transfer, Inc., Gateway Transportation Co., Inc., Glendenning Motorways, Inc., Graham Ship by Truck Company, Graves Truck Line, Inc., Greer. Bay-Chicago Lines, Gross Common Carrier, Inc., H & W Motor Express Company, Hart Motor Express, Inc., Hennis Freight Lines, Inc. of Nebraska, Hyman Freightways, Inc., Ideal Truck Lines, Inc., Mercury Motor Freight Lines, Inc., Mid-American Lines, Inc., Mid Continent Freight Lines, Inc., Middlewest Freightways, Inc., Midwest Motor Express, Inc., Minnesota-Wisconsin Truck Lines, Incorporated, Motor Transport Company, Murphy Motor Freight Lines, Inc., Navajo Freight Lines, Inc., Neuendorf Transportation Co., Orscheln Bros. Truck Lines, Inc., Premier Trucking Service Co., Raymond Motor Transportation, Inc., Ringsby Truck Lines, Inc., The Rock Island Motor Transit Company, J. L. Scheffler Transport, Inc., Sioux Transportation Company, Inc., Sturm Freightways, Inc., Takin Bros. Freight Line, Inc., Toedebusch Transfer, Inc., Twin City Freight, Inc., United-Buckingham Freight Lines, Inc., Werner Continental, Inc., Western Transportation Company, Witte Transportation Company, and Yellow Freight System, Inc., *Plaintiff's.*

vs.

United States of America and Interstate Commerce Commission, *Defendants.*

Appearances:

For the Plaintiffs:

George D. Michalson, Esq.
Post Office Drawer 647
Kansas City, Missouri 64141

Rice, Carpenter & Carraway

By: Roland Rice, Esq.
Suite 618, Perpetual Building
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Washington, D. C. 20004

Jones, Meiklejohn, Kehl & Lyons

By: Alvin J. Meiklejohn, Jr., Esq.
Arthur R. Hauver, Esq.
420 Denver Club Building
Denver, Colorado 80202

For the United States of America:

Walker B. Comegys, Esq., Acting Assistant Attorney General

By: John H. D. Wigger, Esq.
Department of Justice
Washington, D. C. 20530

James L. Treece, Esq.
United States Attorney
323 United States Courthouse
Denver, Colorado 80202

For the Interstate Commerce Commission:

Fritz R. Kahn, Esq., General Counsel

By: Leonard S. Goodman, Esq.
Associate General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

For the Intervenor Drug & Toilet Preparation Traffic Conference:

Belnap, McCarthy, Spencer & Hardy

By: Charles J. McCarthy, Esq.

Richard J. Hardy, Esq.

1750 Pennsylvania Avenue, N. W.

Suite 318

Washington, D. C. 20006

John J. Conway, Esq.

946 Metropolitan Building

1612 Court Place

Denver, Colorado 80202

Before Lewis, Chief Judge, United States Court of Appeals for the Tenth Circuit, Kerr and Doyle, District Judges.

MEMORANDUM OPINION AND ORDER

Doyle, District Judge

I. Facts

This is an action seeking judicial review of a Decision and Order of the Interstate Commerce Commission entered in that Commission's Docket No. 34971, *Increased Rates and Charges, From, To and Between Middlewest Territory*, 335 I. C. C. 397 (June 5, 1969), as modified by Order of August 29, 1969. Plaintiffs assert that insofar as that order purports to or does order them to refund certain portions of a disputed rate increase schedule, that portion of the order should be set aside and annulled, and the enforcement of it enjoined, as beyond the statutory authority and jurisdiction of the Commission.

The transactions leading up to the present controversy began when certain motor carriers of property, including plaintiffs herein, which were parties to and participated in

the tariffs of the Middlewest Motor Freight Bureau, Inc., filed and published schedules naming various increased rates and charges. These increases were scheduled to and did become effective on April 1, 1968. After various protests were filed to the increased rates, the Board of Suspension of the Interstate Commerce Commission declined either to suspend or investigate the increased rates and charges.[1] Upon reconsideration and referral to the entire Commission, it was ordered that an investigation be instituted into and concerning the lawfulness of said increased rates and charges. The Commission did not, however, order suspension of the new rate schedule.[2]

Thereafter, the Commission issued a number of procedural and intermediate notices and orders, including its Order of April 3, 1968,[3] specifying the evidence to be pro-

1. The matter at this stage was assigned Suspension Docket No. 47380.

2. Increased Rates and Charges, From, To and Between Middlewest Territory, I. C. C. No. 34971 (Order of March 29, 1968). The Relevant portions of Section 216(g) of the Motor Carrier Act, 49 U. S. C. § 316(g), provide:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle. . . . the Commission is authorized and empowered upon complaint of any interested party or upon its own initiative . . . to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect.

3. Exhibit B to the Complaint.

duced at a hearing before certain Hearing Examiners, which hearing was ordered to commence on May 20, 1968.

On April 12, 1968, the Department of Transportation and the General Services Administration, which agencies had protested the increases and had been notified and requested by the Commission to furnish certain evidence, requested that the procedural date set forth in the Order of April 3, 1968, be postponed for 90 days.[4] Other protestants apparently did not join in this request. By letter of April 22, 1968, respondents in the investigative proceedings, including plaintiffs herein, also requested "that the date provided in the order of April 3 be postponed for a period of 90 days so that respondents' evidence would be due on August 5, 1968, and the hearing, presently set for May 20, 1968, would be reset to commence on August 19, 1968. The reason for this request [was] the physical impossibility

4. Prior to any formal request for a continuance, an informal meeting was held in the office of the Deputy Director of the Commission's Bureau of Proceedings—Mr. A. L. Corbin. According to the affidavit of Mr. J. D. Lawson, Executive Vice President of Middlewest Motor Freight Bureau at the time, Mr. Corbin asked Mr. Lawson at that meeting whether, if a postponement were granted, the carriers would agree to pay refunds, if the rate increases were not ultimately approved by the Commission. Both Mr. Lawson and counsel for the Middlewest Motor Freight Bureau responded that they had no authority to enter into any such agreement on behalf of the carriers and further stated their belief that the Commission lacked statutory authority to require refunds or to impose a refund agreement as a condition to the grant of a postponement. Affidavit of J. D. Lawson, Appendix B to Reply Brief of Plaintiff. Although Mr. Lawson states that no party requested the refund provision, Mr. John M. Cleary, Esq., also present at that meeting, states that the shippers took the position that they would have no objection to the continuance, if they could be assured that at the end of the proceeding refunds would be made to the extent the rates collected are not shown to have been just and reasonable. Affidavit of John M. Cleary, Intervenor's Exhibit C.

for respondents to compile the required data within the time allowed by the order."[5] In response the Commission issued an order which initially set forth the refund provision in controversy in the case at bar:

> *It is further ordered,* That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and, it is hereby postponed to August 19, 1968, conditioned upon respondents compliance with the refund provision ordered below. . . .
>
> *And it is further ordered,* That respondents be and, they are hereby, ordered to make refunds to the shippers on any shipment moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission.[6]

Five days later, on May 1, 1968, respondents (including plaintiffs herein) petitioned the Commission for reconsideration of the Order of April 25, 1968. They challenged the refund provision on many of the same grounds urged now in the case at bar. Subsequently, however, they withdrew this objection to the refund condition, grounding it on the decision of the Commission in a similar petition, Docket No. 34978, *Pacific Inland Territory*, Rate Increases, 1968.[7]

5. Letter from Mr. John Fessenden, Counsel for Respondents and Middlewest Motor Freight Bureau to Mr. Alvin L. Corbin of the I. C. C., April 22, 1968, Plaintiffs' Exhibit 1(b).

6. Order of April 25, 1968, Exhibit "C" to the Complaint.

7. Increased Rates and Charges, Pacific Inland Terr., 332 I. C. C. 845 (Feb. 13, 1969). According to Intervenor's Brief, respondents in that case refused to comply with a refund condition, and the Commission vacated the order granting a 90-day postponement of the hearing date. The Commission felt that respondents in that case should have been prepared and ready to submit evidence to prove the lawfulness of their proposed tariff changes when the sched-

They further stated that evidence in support of the rates in the Middlewest Territory case could not be compiled by the original hearing date of May 20, 1968. This left the order of April 25, 1968 standing as issued. Subsequent to this withdrawal of the Petition to Reconsider, several protestants in the proceeding advised the Commission by letter that they were not satisfied with a mere withdrawal of the objection to the refund provision, as any guarantee of compliance with the Commission's refund provisions.* These objections proved to be prophetic.

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ules containing those charges were filed with the Commission. *See also*, General Increase, Middle Atlantic and New England, 332 I. C. C. 820 (Feb. 14, 1969).

8. For example, the following letter was addressed to Mr. H. Neil Garson, Secretary, Interstate Commerce Commission, signed by Mr. J. A. DuPont, Manager, Transportation Department, Lincoln Chamber of Commerce, May 7, 1968 (Plaintiffs' Exhibit 1):

> Dear Mr. Garson:
>
> This Protestant is not satisfied that the Respondents' letter, dated May 2, merely withdrawing their May 1, 1968 petition for reconsideration, is any guarantee of compliance with the Commission's refund provisions of its April 25, 1968 order.
>
> . . . If the Protested rates and charges are ordered cancelled, we see a distinct possibility of the Respondents dragging the refund provision through every court in the land before making any actual refunds as contemplated by the Commission. Perhaps some sort of bond covering shippers' monies subject to possible refunds is in order.
>
> Your Protestant believes that the shipping public is entitled to a specific commitment from the Middlewest Motor Freight Bureau that they will abide by the Commission's refund provision paragraph in its April 25, 1968 order. Unless such a commitment can be obtained from the Respondents, it is our position that the earlier procedural dates prescribed in Docket No. 34971 on April 3, 1968, should be reinstated so that this important investigation may promptly proceed.
>
> Sincerely,

No action was taken with respect to this issue until after the postponed hearing on the merits at which time the Commission issued its decision in the matter. In its Report and Order of June 5, 1969, the Commission found that the increased rates and charges "have not been shown to be just and reasonable", ordered them cancelled, and "*further ordered,* That, in accordance with the order entered herein on April 25, 1968, the respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases herein found not shown to be just and reasonable."[9]

Thereafter, the respondents filed a petition to vacate that portion of the Order of June 5, 1969, which required the payment of refunds, and sought reconsideration of the refund order and/or reopening of the subject proceeding for further hearing. Meanwhile, cancellation was made of the disputed increases on statutory notice, effective August 31, 1969, and simultaneously, on statutory notice, respondents filed new and higher increases of six per cent to become effective on September 1, 1969. Following various protests, the Board of Suspension declined to suspend or to investigate the new rate increases. On appeal, the entire Commission: (1) entered its order declining to suspend or investigate the September 1 increases, and (2) entered its order denying respondents' petition to reconsider and vacate the refund order. The Commission further ordered,

> that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.[10]

9. Increased Rates and Charges, From, To and Between Middlewest Territory, 335 I. C. C. 142 (June 5, 1969).

10. Increased Rates and Charges, From, To and Between Middlewest Territory, I. C. C. No. 34971 (Order of August 29, 1969).

A second Petition for Reconsideration of the Order of June 5, 1969, as affirmed by the Order of August 29, 1969, was denied by the Commission by Order of October 27, 1969. Thus, the increased rates were collected from April 1, 1968 to August 31, 1969. The Order to Refund is, however, effective from May 20, 1968 to August 31, 1969.

II. Jurisdiction.

This being an action to enjoin or set aside an order of the Interstate Commerce Commission, jurisdiction is vested in the United States District Courts by 28 U. S. C. § 1336(a) and Section 17(9) of Part I of the Interstate Commerce Act, 49 U. S. C. § 17(9), the latter section being made applicable to Part II of the Interstate Commerce Act (Motor Carrier Act) by Sections 205(g) & (h) of the Motor Carrier Act, 49 U. S. C. §§ 305(g) & (h).[11] Jurisdiction of a three-judge district court is alleged under 28 U. S. C. § 2325, and such a court has been convened to hear the matter as provided by 28 U. S. C. § 2284.

The United States of America, as statutory defendant in this proceeding,[12] and the Interstate Commerce Commission (both defendants hereinafter referred to as the Government) have challenged the jurisdiction of this Court over the subject matter of this action and have challenged the propriety of a three-judge court.

It is to be noted though that the Government in questioning the jurisdiction of this Court to review the case did so as a preliminary matter. We have heard the case as a three-judge court, and the three participating judges have subscribed to the opinion and decision.

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11. *See also* Sections 10(a) & (b) of the Administrative Procedure Act, 5 U. S. C. §§ 702 & 703.

12. *See* 28 U. S. C. § 2322.

We are mindful that 28 U. S. C. § 2312 calls for a somewhat different review procedure in actions "for the payment of money or the collection of fines, penalties and forfeitures." However, we do not regard this case as an action for the payment of money. Its primary concern is the effort of the Commission to uphold and protect its jurisdiction.

It may possibly be that the decision of this Court will have some effect on the effort of the shippers here to obtain refunds. Nevertheless, the instant review is not to be classified as an action to enforce the payment of money or the collection of fines, penalties and forfeitures. The plaintiffs have brought the suit here seeking annulment of an order of the Commission. Because of the high importance of the case we feel duty-bound to entertain the suit and to determine it on its merits. We therefore reject these questions concerning our jurisdiction.[13]

III. Issue

We must decide whether an order of the Commission in which a rate increase is denied, which order directs repayment of interim rates, if determined to be invalid, and which refund order was entered by the Commission as a condition of granting an extension of time to the carriers at their request, is invalid and subject to a judgment annulling the same. We are not involved with the Commission's order denying the increase. We are limited to the propriety and validity of a conditional rate refund order, which order was tacitly or impliedly (by withdrawal of objection) accepted by the carriers, plaintiffs herein.

13. We have considered United States v. I. C. C., 337 U. S. 426, 69 S. Ct. 1410 (1949). The Supreme Court was there speaking of a wholly different kind of case. That had to do with statutory reparations. It was correctly held to be an action only for the collection of money.

IV.

All of the parties appear to be in agreement that the relevant statutory provisions do not vest the Commission with authority to order the payment of refunds. The basic statute, 49 U. S. C. § 316 *et. seq.*, requires motor carriers to establish "just and reasonable rates" to be charged to shippers of goods. These rates are established by filing with the Commission tariffs setting forth the rates, fares and charges to be applied and the publishing of these in accordance with the rules of the Commission. These rates go into effect unless the Commission suspends, cancels or otherwise prevents their becoming effective, and upon their becoming effective they become legal if not lawful rates.

There are remedies provided to aggrieved shippers. Indeed, the Commission itself under Section 216(g) of the Act, 49 U. S. C. § 316(g), may on its own initiative enter into a hearing concerning the lawfulness of the rate, fare, charge, etc. Pending such a hearing the Commission may from time to time suspend the operation of such schedule.

It is to be noted that there is a refund provision applicable to railroads. This is § 15(7) of the Act, 49 U. S. C. § 15(7). No similar provision is found in § 216(g) of the Act granting this kind of express authority with respect to the rates of motor carriers.

Similarly, under Part I of the Act there is a reparations procedure applicable to railroads, 49 U. S. C. §§ 8 and 9. Here there is, however, a procedure applicable to motor carriers, although it has not been invoked in the present case. This measure was adopted in 1965, and prior thereto the Commission had fashioned a reparations procedure without the aid of a Congressional statute. They based it on the theory that a common law remedy survived the passage of the Interstate Commerce Act. The court in which the action was brought referred the issue of the unreasonable-

ness of the rates to the Commission. However, the Supreme Court voided this procedure in the case of *T. I. M. E., Inc.* v. *United States,* 359 U. S. 464, 79 S. Ct. 904, 3 L. Ed. 2d 952 (1959). It was held in the *T.I.M.E.* case that Part II of the Interstate Commerce Act gave no right to past unreasonableness of rates. Thereupon, Congress amended Part II of the Act so as to restore the reparations procedure which had obtained prior to the Supreme Court decision.[14] Under this the Commission had the authority to make an after-the-fact determination as to whether past rates alleged to be unlawful were indeed injust and unreasonable, and also to determine the extent of the unreasonableness.[15]

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14. The amendment is set forth in 49 U. S. C. § 304a(2), (5). Although the amendment does not explicitly set forth the procedure to be used in awarding reparations, the legislative history makes it clear that Congress intended to restore the procedure formerly utilized by the Commission pursuant to the policies which it articulated in Bell Potato Chip Co. v. Aberdeen Truck Line, et al., 43 M. C. C. 337 (1944).

For example, the House Committee report states:

> In effect, these sections would permit a court of competent jurisdiction to award reparations to persons injured through violations of the Interstate Commerce Act by motor carriers and freight forwarders subject thereto. This would be accomplished in accordance with established judicial reference procedures under which the Commission would be called upon to aid the court by making necessary administrative determinations relating to the amount of reparations. This would restore a procedure formerly available to shippers which was set aside by the Supreme Court in 1959 by its decision in the *T.I.M.E.* case. . . .

H. R. Rep. No. 253, 89th Cong., 1st Sess. 12 (1965)—Report to accompany H. R. 5401. *See also* S. Rep. No. 387, 89th Cong., 1st Sess. 8 (1965)—Report of the Committee on Commerce to accompany S. 1727. For legislative history see 2 *U. S. Code Cong. & Adm. News* 2923 (1965).

15. 49 U. S. C. §§ 304a(2), (5) and 316(e).

It is abundantly clear, therefore, that Congress has not authorized the Commission to order refunds as a generally accepted procedure. It is also clear, however, that the Commission did not undertake to exercise any such power nor is this a reparations proceeding such as that which was condemned in the *T.I.M.E.* case. Indeed, we do not view the present action of the Commission as an effort to exercise *any* general authority. The order in question was instead issued incident to a request for a continuance and indeed was not unlike the exercise of the suspension power which the Commission has and had under 49 U. S. C. § 316(g). No doubt the Commission could have ordered the rates suspended at least for a period of time (seven months).

It is strongly suggested that there is a *common law* power of restitution here, and in support of that the Government cites *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943). However, there the Securities Exchange Commission was empowered to consider equitable principles in making its decision. As we view it, a legislative tribunal cannot exercise common law or equity jurisdiction unless this authority is expressly granted by the Congress. But in the present case the Commission did not undertake to apply substantive common law or equity principles. The matter with which it was concerned, that is the granting of an extension of time, was purely procedural. A specific grant of equity jurisdiction was not therefore essential to the imposition of this condition.

An even stronger argument for refusal to annul the Commission's order is the doctrine of equitable estoppel. We have in mind the principle which imposes an obligation on a person to live up to his representations or conduct in circumstances where inequitable consequences would result to persons having the right to rely, and who in good faith

did rely on the representations made.[16] Applied to the case at bar the Commission certainly relied on the carriers' withdrawal of their jurisdictional objection to the refund condition. The Commission's reliance was evidenced by its failure to vacate the order. It did not have to anticipate that the carriers would renege. The carriers' withdrawal of their timely objection was a positive act which evidenced willingness to go along with the condition imposed.

It can also be argued that there was a binding waiver on the part of the carriers resulting from their affirmative withdrawal of their objection. A principle similar to this was applied in *Texaco, Inc.* v. *FPC*, 290 F. 2d 149 (5th Cir. 1961), where gas producers sought to have refund conditions vacated in temporary certificates of public convenience and necessity, which certificates had been awarded by the FPC. Here the producers had not contested the refund provisions at the time of the awards, but only after the FPC required that they be paid. In denying relief to the producers the court stated that the time for the producers to raise the question was before they accepted the certificates with the conditions attached. The FPC had general refund authority, but it does not appear from a reading of the case that they were exercising it in this instance, and the court's decision appears to have been based on the conditional issuance of the certificates.

The Court of Appeals for the Eighth Circuit has recently decided a case which is somewhat analogous to that at bar. *Middlewest Motor Freight Bureau, et al.* v. *United States*, No. 19,870 (8th Cir., October 6, 1970). The question was whether shippers were entitled to *restitution* from carriers

16. Robinson v. Comm'r of Internal Revenue, 100 F. 2d 847, 849 (6th Cir. 1939). There are, of course, narrower definitions of the concept.

for rates charged during the existence of a court-imposed temporary restraining order, which restraining order prevented the operation of a Commission order cancelling carrier rates which were determined by the Commission as not shown to be just and reasonable. Although the Court of Appeals, requiring restitution in that case, viewed the power of the court to order restitution as concomitant with the traditional equity powers of the court to issue injunctions, it also held a rate that is not shown to be just and reasonable to be unlawful, at least from the time the Commission orders it cancelled. The court stated that requiring the shippers to resort to the statutory reparations procedure was requiring double litigation which was an unwarranted burden on the Commission's resources. The court further noted that allowing restitution was not permitting the Commission to accomplish indirectly what it could not accomplish directly, but was merely giving effect to the Commission's order of cancellation—an order which was clearly within its power. These latter considerations seem particularly applicable to our case.

We are unable in good conscience, in view of the circumstances presented, to annul the order of the Commission. The Commission was acting in good faith in granting the extension, and the carriers were at the time agreeable to acceptance of the benefits of such an extension order. Their present posture appears to us to be grossly inequitable and not deserving of court intervention. While we do not commend the procedure as one which should be or could be practiced; we do hold that the peculiar facts of this case, arising as they did, are such as to not justify the granting of the relief requested, namely annulment of the Commission's order and approval of the carriers' conduct.

The practical effect of this ruling is not before us since this is not an enforcement proceeding.

We conclude that the complaint and the cause of action herein be and the same are hereby dismissed.

Dated at Denver, Colorado, this 14th day of January, A. D. 1971.

By the Court:

/s/ David T. Lewis
David T. Lewis
Chief Judge
United States Court of Appeals

/s/ Ewing T. Kerr
Ewing T. Kerr
Judge
United States District Court

/s/ William E. Doyle
William E. Doyle
Judge
United States District Court

Appendix C (2)

No. 70-157. ADMIRAL-MERCHANTS MOTOR FREIGHT, Inc., et al., Appellants, v. UNITED STATES, et al.

404 US 802, 30 L Ed 2d 37, 92 S Ct 51.

October 12, 1971. Appeal from the United States District Court for the District of Colorado. Judgment affirmed.

Same case below, 321 F Supp 353.

Appendix C (3)

No. 70-157. ADMIRAL-MERCHANTS MOTOR FREIGHT, Inc., et al., Appellants, v. UNITED STATES et al.

404 US 987, 30 L Ed 2d 371, 92 S Ct 443.

December 7, 1971. Petition for rehearing denied.

Former Decision, 404 US 802, 30 L Ed 2d 37, 92 S Ct 51.

Appendix D (1)

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois,
Eastern Division

Aluminum Company of America, a Pennsylvania corporation,
Plaintiff,
vs.
Admiral Merchants Motor Freight, Inc., a Minnesota corporation,
Defendant.

70C-1189.

MEMORANDUM OPINION

The issues presented by the plaintiff's motion for summary judgment in each of these three pending cases is whether certain orders of the Interstate Commerce Commission are valid and whether the plaintiff may sue for refund of certain alleged overcharges collected by the three defendants, each a motor carrier.

Plaintiff claims a refund of freight charges based upon the refund order of the Interstate Commerce Commission entered in *Increased Rates and Charges, From, To and Between Middlewest Territory*, Docket No. 34971, 335 I. C. C. 142. Plaintiff is a shipper over the lines of the defendant carriers and the defendants are common carriers by motor vehicle subject to Part II of the Interstate Commerce Act.

The I. C. C. refund order here involved runs against the defendants in these cases and against all other carriers who were parties to certain increased rate tariffs filed by the Middlewest Motor Freight Bureau, Inc., effective April 1, 1968. The Commission had let the increased rates go into

effect on their effective date but, on protest of various parties (not including the plaintiff herein), had instituted an investigation, without suspension, into the lawfulness of the increased rates and had set the matter for hearing on May 20, 1968. When requests were then made by public shippers and the carriers (but not by the private shippers) for an extension of time to prepare for the hearing, the Commission granted a three months extension of time to August 19, 1968, but included in its extension order a refund provision requiring refund of the increased portion of the rates collected on shipments after May 20, 1968, if the increased rates should ultimately not be approved by the Commission.[1]

Thirteen months after granting the extension and after oral hearings and briefing by the carriers and others, the Commission found the increased rate tariffs not shown to be just and reasonable. Based upon this finding, the Commission, on June 5, 1969, ordered the increased rate tariffs cancelled and, in accord with the prior refund proviso, ordered the carriers to make appropriate refunds to shippers.[2]

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1. This order read, in pertinent part, as follows:

   It is further ordered, That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and, it is hereby postponed to August 19, 1968, conditioned upon respondents compliance with the refund provision ordered below . . .

   And it is further ordered, That respondents be and, they are hereby, ordered to make refunds to the shippers on any shipment moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission, I. C. C. Order of April 25, 1968, Docket No. 34971.

2. This order read in pertinent part, as follows:

   It is further ordered, That, in accordance, with the order entered herein on April 25, 1968, the respondents

Subsequent to the June 5th order by the Commission, the respondent carriers petitioned to vacate the order. On August 29, 1969, at a general session of the Commission, the carriers' petition to reconsider and vacate said refund order was denied, and the Commission again ordered the refunds to be made.[3]

The increased rates that were not shown to be just and reasonable were collected by the defendants from April 1, 1968 to August 31, 1969, with the Order to Refund applicable only to charges made from May 20, 1968 to August 31, 1969. Although the defendants in each case deny any liability whatsoever, they do specify the amount of refund of freight charges to which the plaintiff would be entitled in each case if the latter is entitled to any refund under the orders of the Commission.[4] The issues before us, then, are exclusively legal questions.

I.

The initial issue which we must resolve is the propriety and validity of the I. C. C. refund order that affects the

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be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968 to the extent that such charges included the increases found not shown to be just and reasonable. I. C. C. Order of June 5, 1969, Docket No. 34971.

3. This order, the final order involved in the instant litigation, read as follows:

> . . . that the respondents will hereinafter, in accordance with the said decision of June 5, 1969, make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence. I. C. C. Order of August 29, 1969, Docket No. 34971.

4. For a more thorough factual discussion of the actions taken before and by the Commission in regard to the matters involved in this litigation, see *Admiral-Merchants Motor Freight, Inc., et al. v. United States*, 321 F. Supp. 353 (D. Colo. 1971), *aff'd* 40 U. S. L. W. 3143, 3160 (U. S. Sup. Ct. Oct. 12, 1971).

defendants. The defendants argue at great length that the order was void for numerous reasons. This issue, however, has been resolved against them by the Courts that have previously reviewed their contentions. In *Admiral-Merchants Motor Freight, Inc., et al. v. United States,* 321 F. Supp. 353 (D. Colo. 1971), *aff'd* 40 U. S. L. W. 3143, 3160 (U. S. Sup. Ct. Oct. 12, 1971), the motor carriers involved before the Commission sought to have the refund orders of the Commission overturned. A three-judge district court was convened in Denver to hear this suit and denied the carriers' request. The Supreme Court affirmed in a per curiam decision without opinion.

The only basis that has been suggested by the defendants in opposition to the motion for summary judgment that would distinguish *Admiral-Merchants* from the instant case is that *Admiral-Merchants,* unlike the proceedings herein, was not an enforcement proceeding but merely an attack upon the refund order entered by the Commission. The district court stated in this respect, "The practical effect of this ruling is not before us since this is not an enforcement proceeding." 321 F. Supp. at 360. We believe that this distinction, however, is not relevant to the initial issue of the propriety of the Commission order.

The defendants contend that the Colorado district court did not affirm the order of the Commission, but merely refused the plaintiffs in that suit (the carriers) the relief that they requested. This myopic reading of the opinion of the district court is belied by the statement of issues set forth by that court and by the question presented on appeal to the United States Supreme Court.[5] A reading of these "presented" issues clearly indicates that both the District

5. The district court framed the issue presented as follows:

> We must decide whether an order of the Commission in which a rate increase is denied, which order directs

Court and the Supreme Court were affirming the validity of the Commission refund order.

Yet another reason makes apparent that the District Court and the Supreme Court were adjudicating and affirming the validity of the Commission's refund order. Under the procedures established for review of Interstate Commerce Commission orders, those orders are self-enforcing,[6] but the carriers or other interested parties are given the right to apply to a three-judge court to enjoin them.[7] It

repayment of interim rates, if determined to be invalid, and which refund order was entered by the Commission as a condition of granting an extension of time to the carriers at their request, is invalid and subject to a judgment annulling the same. . . . We are limited to the propriety and validity of a conditional rate refund order, which order was tacitly or impliedly (by withdrawal of objection) accepted by the carriers . . . 321 F. Supp. at 358.

The question presented to the Supreme Court on appeal from the district court decision was framed as follows:

> Did Interstate Commerce Commission, after investigating motor carriers' increased rates, exceed its statutory authority in directing refund of increases from revenues collected during investigation upon determining, allegedly without findings or rationale, that rates "had not been shown to be just and reasonable"? 40 U. S. L. W. 3026.

6. See, Sections 15(2), 16(7), 221(b) and 222(a) of the Interstate Commerce Commission Act, 49 U. S. C. §§ 15(2), 16(7), 321(b) and 322(a).

7. After the first nineteen years of the Commission's existence in which its orders were not reviewable through direct proceedings, the Hepburn Act of 1906, 34 Stat. 584 (1906), 49 U. S. C. § 1 *et seq.*, expressly conferred jurisdiction on the federal district courts to enjoin, set aside, or annul orders of the Interstate Commerce Commission. The procedure prescribed was that adopted in 1903 by the Expediting Act, 32 Stat. 823 (1903), 49 U. S. C. § 44, *i.e.*, a three-judge court with direct appeal only to the Supreme Court. These same mechanics of appeal are made applicable to motor carriers subject to Part II of the Interstate

follows, then, that under these procedures an affirmance of a Commission order results from a three-judge district court's refusal to enjoin. Because the three-judge court refused in *Admiral-Merchants* to enjoin or set aside the refund order of the Interstate Commerce Commission, with the Supreme Court affirming that decision, we conclude, apart from the statements of issues given by and to those Courts, that those Courts in fact affirmed the validity of the Commission refund order. Therefore, the defendants are precluded from attacking this order under the established doctrine of *res judicata* and this Court is likewise bound to accept the validity of the refund order.

II.

Having made the determination that the Commission's refund order was valid, the next issue presented to the Court concerns the practical effect of the order upon plaintiff's rights.[8] In dealing with the practical effects of the order, three separate questions arise. The initial question is whether the plaintiff's failure to intervene or otherwise become involved with the proceedings before the Interstate Commerce Commission is an impediment to its instant suit.

Commerce Act by Sections 205(g) and (h) of the Motor Carrier Act, 49 U. S. C. §§ 305(g) and (h). The statutory provisions for review of orders of the Commission are now codified as 28 U. S. C. §§ 1253, 1336, 2284, 2321-25 and 49 U. S. C. §§ 17(9), 305(g) and 305(h). See, generally, Anderson and Feeney, Manual of Practice and Procedure Before the Interstate Commerce Commission 54 (1967), and *I. C. C.* v. *Atlantic Coast Line*, 383 U. S. 576 (1966) at 603-604.

8. As noted above, the decision of the three-judge district court in *Admiral-Merchants*, *supra*, n. 4, did not pass upon the practical effects of its upholding of the I. C. C. refund order involved herein. 321 F. Supp. at 360. We agree, therefore, with the urgings of the defendants that *Admiral-Merchants* is not relevant to the rights of the plaintiff in seeking enforcement of that order, with the exception, of course, of that case's core finding of validity of the order.

Second, we must determine if the plaintiff has a statutory basis for suit. Finally, we must consider plaintiff's asserted equitable basis for recovery of restitution.

A. Although they never specifically make the allegation, the defendants appear to argue at various points in their brief in opposition to the motion for summary judgment that the plaintiff should be precluded from collecting any refunds under the order of the Interstate Commerce Commission because it was not a party to the proceedings before the Commission which culminated in that order nor in the subsequent review proceedings in which the refund order was affirmed. If the defendants are making this argument, we do not believe it to be meritorious because the litigation before the I. C. C. was intended to benefit all shippers over the lines of the carriers subject to the order.

In *Phillips* v. *Grand Trunk Railway*, 236 U. S. 662 (1914), the plaintiff therein was accorded the benefits of a reparations order entered in an I. C. C. proceedings to which it was not a party. As the basis for its rationale, the Supreme Court stated:

> . . . the proceeding before the Commission, to determine the reasonableness of the [contested rate increase], was not in the nature of private litigation between [the protestants] and the carriers, but was a matter of public concern in which the whole body of shippers was interested. The inquiry as to the reasonableness of the advance was general in its nature. The finding thereon was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint, or intervened during the hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been

> organized to secure. The plaintiff and every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding and order.[9]

We believe that *Phillips* is precisely in point with the facts of the instant litigation and that plaintiff, therefore, is not precluded from recovering its claims merely because it was not involved in the proceedings before the Commission.

Furthermore, the plaintiff should be entitled to rely upon the refund order regardless of the principles of the *Phillips* case, for the reason that plaintiff is a member of the class that the refund order was designed to protect. It was the money of all shippers over the lines of the carriers that were party to the rate increases which was put at risk when the Commission agreed to the request for a long continuance of the hearing on the validity of the rate increase.

The following facts can be developed from the record in the I. C. C. proceedings and the facts as found by the three-judge district court in *Admiral-Merchants*. After various protests were filed with the Commission concerning the increased tariffs, the I. C. C. ordered an investigation into and concerning the lawfulness of the increased rates, but did not, however, order suspension of the new schedules. The Commission originally planned to handle the case under special expedited procedures and prescribed that an examiner's recommended report and order should be dispensed with because the circumstances required an expedited decision. After the date was set for the hearing, however, the carriers (amongst others) requested by letter that the date for the hearing be postponed so that they could prepare their evidence. The Commission granted the request, but put the controverted refund proviso into its order.[10] Five days later, the carriers petitioned the Com-

9. 236 U. S. at 665.

10. Order of April 25, 1968, *supra* n. 1.

mission for reconsideration of the order, challenging the validity of the refund provision on various grounds. Subsequently, however, they withdrew this objection, leaving standing the original order of April 25, 1968.

It is obvious to this Court that the refund provision was part of a *quid pro quo*. The Commission granted the continuance requested by the carriers, which gave them at least a temporary right to charge the increased rates, but at the same time, the Commission also attempted to protect all shippers affected by the proposed increase from injury should the rates not be ultimately approved by including the refund provision within the order that granted the continuance. It follows that the plaintiff is, in effect, a third party beneficiary of the refund provisions that the Commission exacted as a condition for the continuance of the hearing without suspension of the increased rates.

As the plaintiff paid the increased shipping charges to the defendant carriers subsequent to the date of the granting of the continuance and prior to final Commission resolution of the issues, it was providing the carriers with moneys that were earmarked for return should the latter fail to convince the Commission that the increased rates were just and reasonable. Because the carriers failed to meet their burden of convincing the Commission of the reasonableness of their rate increases, only a distorted view of justice could lead to any conclusion other than that the plaintiff is entitled to the return of these earmarked moneys in accord with the Commission refund orders irrespective of its lack of participation in the I. C. C. proceedings or court review thereof.

B. The next question to be resolved is whether the plaintiff has a statutory basis for recovery of the moneys it paid to the defendants attributable to the unapproved rate increases which were ordered refunded. The plaintiff contends that it is entitled to a judgment for the amount of the refund due under the Commission's order based upon

Sections 16(2) and 205(g) of the Interstate Commerce Commission Act, 49 U. S. C. §§ 16(2) and 305(g). The defendants, not surprisingly, contend that the plaintiff is not so entitled.

Section 205(g) of Part II of the Interstate Commerce Commission Act, 49 U. S. C. § 305(g), provides that any final order made under Part II, which deals with motor carriers, "shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I (which deals with railroads)." Because no doubt exists that we are dealing with a final order made under Part II of the Interstate Commerce Act[11] and because we have concluded above that the plaintiff is a party in interest to such order, we must, therefore, look to Part I of the Act to determine the scope of the plaintiff's rights.

Section 16(2) of Part I of the Act, 49 U. S. C. § 16(2), provides in part as follows:

> If a carrier does not comply with [a Commission] order for the payment of money. . ., any person for whose benefit such order was made, may file in the district court of the United States. . ., a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages. . . .

While no doubt exists that this section was designed originally to cover orders by the Commission in reparations

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11. There are three different orders of the I. C. C. in Docket No. 34971 containing provisions relating to the refund here involved, as set forth in notes 1, 2 and 3, *supra*. It is the Commission's order of August 29, 1969, *supra* n. 3, in which the Commission denied the carrier's petition to vacate that portion of the prior order requiring refund payments to shippers and which again affirmatively ordered such payments to be made, that is the final Commission order involved in this suit.

situations,[12] no reason appears why the valid order of the I. C. C. involved herein for the payment of money, which order clearly is covered under the language of the statute quoted above, should not also be deemed within the purview of this section.

The defendants' sole ground for denying that Section 16(2) of the Act provides plaintiff with a statutory remedy is that *T. I. M. E., Inc.* v. *United States*, 359 U. S. 464 (1959) prevents this Court from granting the relief that the plaintiff now seeks. In that case, the Supreme Court concluded that the Interstate Commerce Commission had no power to award reparations under Part II of the Interstate Commerce Act as it then existed.[13] The defendants argue that the analysis of the *T. I. M. E.* decision prohibits the type of order which the Commission has promulgated in these proceedings because such order in effect grants a right of reparations other than the statutory right granted by Congress subsequent to *T. I. M. E.* This argument, however, is simply another attack on the validity and propriety of the Commission's refund order, which has been litigated and sustained all the way to the Supreme Court.

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12. Reparations may be ordered by the I. C. C. to shippers if a proposed new tariff has gone into effect and the Commission subsequently determines that such increase is "not justified" (in the case of railroads) or "unjust and unreasonable" (in the case of motor carriers). *See*, 49 U. S. C. §§ 15(7) and 304a(2) and (4). In a reparation proceedings relating to motor carriers, the Commission is empowered to make affirmative findings as to past unreasonableness of rates. No such findings were made by the Commission in Docket No. 34971 because the proceedings therein (as in the case in the instant suit) did not deal with a claim for reparations.

13. Subsequent to this case, Congress amended the Act to provide a limited right to shippers to collect reparations from motor carriers. Pub. L. 89-170 (1965) amended § 304a of Title 49 to allow such suits for reparations. *See generally*, 1965 U. S. Code Cong. and Adm. News 2923.

In no sense did the *T. I. M. E.* decision consider the issue of whether, when the Commission does issue a valid refund order under Part II, the shippers for whose benefit the order was issued can proceed under Section 16(2) of Part I. For the reasons outlined above and because the defendant asserts nothing which would support a contrary conclusion other than the one argument already discussed, we conclude that the plaintiff is entitled, under Sections 16(2) and 205(g) of the Interstate Commerce Act, 49 U. S. C. §§ 16(2) and 305(g), to a judgment for the amount of the refund due under the Commission's order.

C. The plaintiff contends that, apart from its statutory right to judgment against the defendants, it is also entitled to a judgment under the Court's power to award restitution. The arguments in support of and against this theory of recovery involve the subtle implications of the *T. I. M. E.* decision as they affect Section 216(j) of the Act, 49 U. S. C. § 316(j).[14] We need not, however, reach this pool of troubled waters because of a more basic impediment to plaintiff's recovery under this theory. If plaintiff has some common law or equitable basis for recovery, the cause of action would arise outside of the Interstate Commerce Act and would, apparently, be a standard diversity action. This basis for jurisdiction has not been alleged and probably could not be alleged because the minimum amount in controversy required by 28 U. S. C. § 1332 for federal jurisdiction in diversity actions does not appear to be involved and, further, because the plaintiff appears to be a resident of the same state for jurisdictional purposes as that of at least one of the defendants. At the least, this jurisdictional

14. 49 U. S. C. § 316(j) provides:

Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

problem would preclude us from presently granting the plaintiff's motion for summary judgment based upon a theory of restitution.

III.

The only remaining issue to be resolved concerns the amount of the judgment to which the plaintiff is entitled in each of these three cases. The defendant appears to contend that a factual issue remains which precludes the granting of summary judgment concerning the amount of plaintiff's damages. We do not, however, believe this issue to be present in these cases.

In each of the three pending cases, the respective defendant has stipulated that if the plaintiff is entitled to refund under the orders of the Commission in Docket No. 34971, then it is entitled to a specified dollar amount under the order. These dollar amounts, we believe, are the precise measure of the plaintiff's damages attributable to the defendants' failure to abide by the Commission's valid order to which they agreed. The disputed issues of fact to which the defendants aver, such as the presence or lack thereof of unjust enrichment to the defendants and the extent of unlawfulness of the rates in the disapproved tariff, are not relevant to the issue of plaintiff's damages under the Commission's order. Accordingly, because no material issue of fact remains, we grant the plaintiff's motion for summary judgment in these three cases for the amount specified in its stipulation with each of the defendants.

The only element of this suit over which we cannot now grant judgment is the plaintiff's request for reasonable attorneys' fees.[15] Because no evidence or suggestion has

15. 49 U. S. C. § 16(2) provides in this regard:

> . . . If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

been tendered as to what dollar amount would constitute reasonable attorneys' fees in these proceedings, counsel for the plaintiff will have an opportunity to present evidence on this subject within five days hereof. If no such evidence is presented, no further action with respect to an allowance of attorneys' fees will be taken. If such evidence is presented, defendants will have five days in which to file any objections to the amounts requested by plaintiffs.

Counsel for the plaintiff shall prepare and submit within short date an order consistent with the foregoing for each of the three pending suits.

/s/ Hubert L. Will,
United States District Judge

Dated: November 10, 1971.

Appendix D (2)

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois,
Eastern Division

Aluminum Company of America, a Pennsylvania corporation,
Plaintiff,
vs.
Admiral Merchants Motor Freight, Inc., a Minnesota corporation,
Defendant.

70C-1189.

MEMORANDUM OPINION

The plaintiff in these actions has sued the defendants for refund of certain freight charges pursuant to relevant orders of the Interstate Commerce Commission. We have previously ruled that those orders were valid and that the plaintiff is entitled to the refunds. The issue now before the Court concerns the propriety of awarding attorneys' fees to the plaintiff.

We concluded in our prior ruling that Section 205(g) of Part II of the Interstate Commerce Act, 49 U. S. C. § 305(g), which provides that any final orders made by the Commision under Part II (which deals with motor carriers) shall be subject to the same right of relief in court by any party in interest as is provided with respect to orders of the Commission made under Part I (which deals with railroads) also brought into action Section 16(2) of Part I of the Act, 49 U. S. C. § 16(2). This latter section provides that, if a carrier fails to comply with a Commision order for the payment of money, an aggrieved party may file a suit in a federal district court

and, if the plaintiff finally prevails, *he shall be allowed a reasonable attorneys' fee* to be taxed and collected as a part of the costs of the suit.

The defendants contended in response to plaintiff's motion for summary judgment that Section 16(2) of Part I of the Act was not incorporated into Part II of the Act by Section 205(g) of Part II. They now argue that, even assuming the correctness of our prior decision that Section 16(2) was incorporated so as to allow the plaintiff to sue for the contested refunds, Section 16(2) is not incorporated in its entirety so as to allow the awarding of attorneys' fees to a shipper who has prevailed in his suit against a motor carrier. The basis for this argument in brief is that Congress has specifically provided for the awarding of attorneys' fees to prevailing plaintiffs in suits against railroads (in Part I of the Interstate Commerce Act) and in suits against water carriers (in Part III of the Act) but has not specifically provided this right in suits against motor carriers (with certain limited exceptions) from which they infer that Congress did not intend to provide for attorneys' fees in motor carrier cases. They further argue that were we to award attorneys' fees, we would be rewriting the Interstate Commerce Act by the cross-application of one part of the Act to another part in the absence of clear Congressional intent.

Defendants' contentions, though ingenious, are not persuasive. Congress has specifically granted to any party affected by any final order made by the Commission with respect to motor carriers the same rights of relief in court as is provided to persons affected by Commission orders relating to railroads. 49 U. S. C. § 305(g). Once it is concluded that Section 16(2) of Part I of the Act applies in the instant proceedings, it follows, absent any indication of a contrary intent, that Congress intended all, not only a portion, of that section to be incorporated into Part II

of the Act by 49 U. S. C. § 305(g). The fact that Congress did not specifically authorize the awarding of attorneys' fees to plaintiffs who must sue to collect money from motor carriers under valid Commission orders is immaterial because it has specifically and independently granted to such plaintiffs the same right of relief as if they were suing railroads under Part I. Accordingly, we conclude that plaintiff is entitled to reasonable attorneys' fees under Section 16(2) of Part I of the Interstate Commerce Act, 49 U. S. C. § 16(2).

In passing, it may be noted that, in light of defendants' course of conduct, these are particularly appropriate cases for requiring them to reimburse plaintiff for the expense of employing counsel to bring these actions. The validity of the Commission's orders on which these actions are based has previously been upheld by a three-judge district court in Colorado and the decision of that court has been affirmed by the United States Supreme Court. There is no substantial dispute with respect to the amounts involved in these cases as our previous opinion indicates.

With a tenacity reminiscent of the Russian defense of Stalingrad in World War II, the defendant motor carriers apparently intend to resist on a case by case basis refunding to shippers the overcharges which they collected prior to the Commission's determinations that they were unwarranted and should be repaid. Counsel for the defendants have already advised the Court that they have been instructed to appeal the rulings in these cases all the way to the Supreme Court again if necessary.

It may be that the defendants hope to make pursuing the refunds so expensive that the shippers will abandon their efforts leaving the carriers to retain and enjoy the benefit of their excess charges. This, of course, is the very reason Congress provided for the allowance of attorneys' fees

in court actions against carriers for overcharges made necessary by the carriers' refusal to comply with a Commission order.

The defendants acknowledge that the amount of money sought by the plaintiff in each of these actions is reasonable and should be awarded if the plaintiff is entitled to any such fees at all. Judgment will be entered, therefore, for the plaintiff in the amounts request by the plaintiff for attorneys' fees.

An appropriate order will enter.

/s/ Herbert R. Will,
United States District Judge.

Dated: November 30, 1971.

Appendix D (3)

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois,
Eastern Division

Aluminum Company of America, a Pennsylvania corporation,
Plaintiff,
vs.
Admiral Merchants Motor Freight, Inc., a Minnesota corporation,
Defendant.

70C-1189.

MEMORANDUM OPINION

The plaintiff in these actions has sued the defendants for refund of certain freight charges pursuant to relevant orders of the Interstate Commerce Commission. We have previously ruled in response to the plaintiff's motions for summary judgment that those orders were valid and that the plaintiff is entitled to the refunds. *Aluminum Company of America* v. *Admiral Merchants Motor Freight, Inc., et al.*, ... F. Supp. ..... (N. D. Ill. 1971). The defendants have filed motions for a new trial and to alter and amend judgment, which, in addition to reiterating several of the grounds previously urged in opposition to the motions, present several new theories in support of their contention that they do not owe the plaintiff any moneys under the orders of the Interstate Commerce Commission.

The initial new contention of the defendants is that the plaintiff's claims are barred by the one year statute of limitations contained in Section 16(3)(f) of the Interstate Commerce Act, 49 U. S. C. § 16(3)(f).[1] The defendants'

1. This section provides:
A complaint for the enforcement of an order of the commission for the payment of money shall be filed

argument is that, although the suits involved herein were filed within one year after the final order of the Interstate Commerce Commission that directed the carriers to refund certain moneys to shippers like the plaintiff, the type of suit which the plaintiff originally filed sought "reparations" as opposed to "enforcement," with a claim for enforcement not being made until it filed its motions for summary judgment, which did not occur until more than one year after the date of the Commission order.[2] The defendants argue that a reparation proceedings is statutorily different than an enforcement proceedings and, even assuming the correctness of our prior decision that § 16 of Part I of the Act (which deals with railroads) has been incorporated into Part II of the Act (which deals with motor carriers) by § 205(g) of the Act, at the time the plaintiff attempted to convert its suits from claims for reparations to claims for enforcement, the cause of action for enforcement had been extinguished by the statute of limitations.

This contention of the defendants is clearly refuted by Rule 15 of the Federal Rules of Civil Procedure, particularly subsections (b) and (c) thereof.[3] By virtue of Rule

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in the district court or the state court within one year from the date of the order, and not after.

2. The chronology of events as involves this aspect of the defendants' motion is as follows. The final order of the Commission was entered in its Docket No. 34971 on August 29, 1969. The plaintiff's suits were filed on May 19, 1970, and its motions for summary judgment were filed on May 7, 1971.

3. Subsection (b) of Rule 15, Fed. R. Civ. P., provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Subsection (c) provides for the relation back to the date of the original pleading of any new claim or defense asserted in an amended pleading, providing the new claim "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

15(b), the issues raised in the motions for summary judgment must be treated as if raised in the pleadings because they were argued by the parties in the motions for summary judgment. All parties devoted a substantial portion of their briefs in support of and in opposition to the summary judgment motions, the only point in these proceedings in which these purely legal issues would be raised even if the motions were denied for factual reasons and the suits ultimately went to trial, arguing that the Court either possessed or lacked the power to grant enforcement of the Commission order under §§ 16(2) and 205(g) of the Act, 49 U. S. C. §§ 16(2) and 305(g). As the "new" theory of recovery asserted by the plaintiff in its motions for summary judgment clearly arose out of the transactions and occurrences alleged in the original complaints, the new matter relates back to the date of the original pleadings under Rule 15(c).

In opposition to the above conclusion, the defendants argue that the federal procedural rules cannot be used to create substantive rights. However, as Professor Moore has aptly stated:

> The Federal Rules have broadened the meaning of the concept of "cause of action," shifting the emphasis from a theory of law as to the cause of action, to the specified conduct of the defendant upon which the plaintiff relies to enforce his claim . . . An amendment which changes only the legal theory of the action, or adds another claim arising out of the same transaction or occurrence, will relate back . . . [Various mechanical rules used to restrict the application of Rule 15(c)] are properly rejected, since they largely reflect attempts to limit relation back to the same "cause of action," when the Rule has abandoned that concept in favor of the "same transaction or occurrence" test.[4]

As suit under §§ 16(2) and 205(g) of the Interstate Commerce Act does not present the problems of defining pro-

4. 3 Moore's Federal Practice § 15.15[3], pp. 1027, 1028, 1032.

cedural versus substantive rights and the effects thereon of the Federal Rules which are often present in diversity cases when dealing with state created rights, *cf.*, ***Erie Railroad Co.*** v. ***Tompkins,*** 304 U. S. 64 (1938); ***Ragan*** v. ***Merchants Transfer & Warehouse Co.,*** 337 U. S. 530 (1949), we do not believe the defendants' objections to the Rules are well founded. Accordingly, we conclude that the plaintiff's claims for enforcement of the Commission order relate back to the time it filed its complaints and are not barred by the statute of limitations.

The second main new contention of the defendants deals with the scope of relief available to the plaintiff under § 205(g) of the Act, 49 U. S. C. § 305(g).[5] Defendants urge a particularly narrow reading of Section 205(g), claiming that it only provides for judicial review of orders entered by the Commission under Part II and for relief *from* such orders. The defendants apparently concede that Section 205(g) incorporates into Part II selected portion of the relief provisions of Part I but not all of them. Apparently, the defendants contend that the plaintiff would be entitled by virtue of Section 205(g) to review of the Commission's refund order here involved in order to determine its validity but not to obtain its enforcement, and only if it desired relief *from* but not *under* such order.

This reading of § 205(g) is neither logical nor persuasive. If Congress had intended that only injured parties who wanted relief from a Commission order entered under Part II of the Act were entitled to the scope of review authorized under Part I, it obviously would have chosen language limiting such relief to any "party injured" or

5. This section provides in part as follows:
Any final order made under this part [Part II of the Act which relates to motor carriers] shall be subject to the same rights of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I . . .

"aggrieved party" rather than to "any party in interest," the language it did utilize. "Any party in interest" obviously includes the total universe of people affected by a Commission order, both those who are injured by it and those who are benefited and who equally as obviously would have no desire to have relief *from* such an order but whose only interest would be to have that order entered and its specific benefit enforced.

The defendants refer the Court to numerous decisions wherein, they state, it was held that only the Commission could obtain an enforcement order from the courts to enforce its orders or regulations entered under Part II of the Act and that section 205(g) does not create or preserve a private right of action for damages against motor carriers.[6] We have examined each of these cases and conclude that they are not applicable because they did not, with one exception, even involve Section 205(g),[7] and none of the cases involved a suit by an obviously interested party for the payment of moneys specifically ordered by the Commission.[8]

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6. Baggett Transportation Co. v. Huges Transportation, Inc., 393 F. 2d 710 (8th Cir. 1968); Riss & Co., Inc. v. Association of American Railroads, 178 F. Supp. 438 (D. D. C. 1959); McFadden Express, Inc. v. Adley Corp., 363 F. 2d 546 (2d Cir. 1966), cert. denied 385 U. S. 900 (1966); Hill's Jitney Service, Inc. v. Stiltz, 238 F. Supp. 881 (D. Del. 1965); Charles Noeding Trucking Co. v. United States, 29 F. Supp. 537 (D. N. J. 1939); Consolidated Freightways, Inc. v. United States, 216 F. 2d 543 (9th Cir. 1954); Hamper v. Transcon Lines Corp., 425 F. 2d 1178 (10th Cir. 1970).

7. The only case of the group cited by the defendant that any nexus to § 205(g) is *Charles Noeding Trucking Co., supra.* That case only briefly refered to § 205(g), then designated as § 205(h), and merely concluded that a trucking company was authorized by that section to bring suit against the Commission in an attempt to overrule a final order of the Commission removing a partial statutory exemption. 29 F. Supp. at 543-544.

8. The cited cases dealt with (1) suits by one motor carrier (or railroad) against another motor carrier as-

The defendants further argue that the courts have refused to apply sections of one part of the Act to other parts or to imply a cause of action provided for in one part into another part where it is not expressed. We do not have any quarrel with this proposition of law but do not find it apposite to the specific issue before us since the language of § 205(g) of Part II indicates that it does in fact incorporate Section 16(2) of Part I. We believe that the general provisions of law urged by the defendants are accurate insofar as they relate to private suits seeking to enforce the provisions of Part II of the Act that have been left to the sole province of the Commission, but do not have any bearing upon the construction of § 205(g) when shippers are seeking to obtain payment from a motor carrier pursuant to an order of the Commission when directs such payment and which has been reviewed and upheld by the United States Supreme Court. Because the defendants have not suggested any new theory of merit in their attempt to persuade the Court to reverse its prior decision, we adhere to our prior conclusion that § 205(g), by its terms, incorporates into Part II of the Act § 16(2) of Part I of the Act so as to allow a shipper to sue a motor carrier to compel the latter to comply with an order of the Commission for the payment of money.

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serting that the latter was operating without a statutorily required certificate of convenience and necessity or beyond such certificate that it did possess and asking for an injunction against the continuation of such practices and/or money damages (*Baggett, McFadden, Consolidated Freightways*, and *Riss & Co.*); (2) a suit by a private party against a motor carrier seeking to enjoin the latter from operating with defective motor equipment (*Hamper*); and (3) a suit by a motor carrier against the Commission seeking to set aside a Commission order removing a partial statutory exemption from the scope of the Act (*Charles Noeding Trucking Company*). It is clear, that the type of suit with which we are involved here is of a completely different nature than the suits involved in the cases to which the defendants refer.

Another contention urged by the defendants is that the Commission's refund order here in question does not involve "an order for payment of money" and therefore § 16(2) of the Act is not available to plaintiff. In support of this conclusion, the defendants cite the statements of the three-judge court in *Admiral-Merchants Motor Freight, Inc.* v. *United States*, 321 F. Supp. 353, 357 (D. Colo. 1971), aff'd, 40 U. S. L. W. 3143, 3160 (U. S. S. Ct. Oct. 12, 1971). A close reading, however, of that opinion will disclose that the conclusion of the court was a restricted one. The question before it was whether a three-judge tribunal was proper in that case under 28 U. S. C. §§ 2321 and 2325.[9] The court, having heard the matter as a three-judge court and all judges being in agreement on the merits, concluded in announcing its decision that it possessed jurisdiction that the case was primarily concerned with the efforts of the Commission to uphold its jurisdiction, nothwithstanding that its decision might have some effect on the efforts of shippers to obtain the refunds ordered by the Commission.[10]

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9. These sections provide in part:

28 U. S. C. § 2321. The procedure in the district courts in actions to enforce, suspend, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.* * *

28 U. S. C. § 2325. An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under § 2284 of this title.

10. The Court stated in this regard:

. . . [w]e do not regard this case as an action for the payment of money. Its primary concern is the effort of the Commission to uphold and protect its jurisdiction.

It may possibly be that the decision of this Court will have some effect on the effort of the shippers here to obtain refunds. Nevertheless, the instant review is not

A reading of the entire opinion indicates that the three-judge court was determining that it possessed jurisdiction, not that it was determining whether suits to *enforce* refunds could properly be brought under §§ 16(2) and 205(g) of the Act. Certainly its conclusions as to its own jurisdiction do not foreclose this Court from holding that the refund orders involved[11] are orders for the payment of money sufficient to bring these suits within the ambit of § 16(2).

The phraseology of the controverted refund provisions which the three-judge court found the truckers to have agreed to as a condition precedent for the granting of the desired continuance indicates that they must be deemed as orders for the payment of money as concerns § 16(2) because that language can have absolutely no other meaning.[12] The mere fact that no such Commission order has

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to be classified as an action to enforce the payment of money or the collection of fines, penalties and forfeitures. The plaintiffs have brought the suit here seeking annulment of an order of the Commission. Because of the high importance of the case we feel dutybound to entertain this suit and to determine it on its merits. We therefore reject these questions concerning our jurisdiction. * * * 321 F. Supp. at 357-358.

11. These orders are set out in their entirety in our original decision, Alcoa v. Admiral-Merchants Motor Freight, Inc., et al., *supra*, ... F. Supp. at ....., nn. 1, 2, and 3.

12. The Commission stated, for example, "that respondents be, and they hereby are, ordered to make refunds to the shippers on any shipment moving after May 20, 1968 to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission." I. C. C. Order of April 25, 1968, Docket No. 34971. After its investigation led the Commission to conclude that the carriers had not met their statutory burden of proving the reasonableness of their proposed rates, the Commission ordered that "the [carriers] be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases found not shown to be just and reasonable." I. C. C. Order of June 5, 1969, Docket No. 34971.

ever previously been classified as an order for the payment of money under § 16(2) reflects nothing more significant than that the orders involved in the Commission proceedings underlying these lawsuits were the first such orders ever issued by the Commission that did not deal with either common law or statutory reparations. As the validity of the orders has been upheld, removing that issue from this litigation, we can reach no conclusion other than that these orders were "for the payment of money" within the scope of § 16(2) of the Act and that the jurisdiction decision of the Denver three-judge court does not compel us to conclude otherwise.

Another ground urged by the defendants as a basis for their motion to alter and amend judgment is that the order of the Commission is confiscatory. We note in this regard that the three-judge district court concluded that the carriers had accepted the controverted conditional rate refund order tacitly or impliedly by withdrawal of their original objection to that order.[13] Therefore, if the order were confiscatory, the carriers should not have accepted it, and should have protested it at every stage of the proceedings before the Commission as well as before the courts, as opposed to the course of action they chose of failing to protest such order until after the Commission had terminated the proceedings adversely to them. We believe that they have waived any right now to complain of the allegedly confiscatory nature of the order.

Even if such waiver had not occurred by their withdrawal of objection at the Commission proceedings, the carriers would nevertheless be precluded from now raising the confiscatory nature of the order because the time to have so raised that objection was when they attempted to overturn the order before the three-judge court. The con-

13. Admiral-Merchants Motor Freight, Inc. v. United States, *supra*, 321 F. Supp. at 356, n. 7, 358.

fiscatory nature of the order, if any, would have been grounds for overturning the order and a basis for finding it invalid. However, the order has been found valid by the Supreme Court which precludes any further review thereof. We are at a loss to understand what the defendants view the Supreme Court as having done when it affirmed the decision of the lower court. It seems obvious that if the order were indeed as invalid as the carriers now contend, the Supreme Court could not have affirmed the three-judge court decision. We conclude, therefore, that the issue of the alleged confiscatory nature of the Commission order is no basis for vacating the judgment previously entered in this suit because (1) the defendants waived that contention when they accepted the terms and benefits of the Commission's conditional refund order and (2) in any event, that objection which goes to the validity of the order is irrelevant to the proceedings before us since the Supreme Court has affirmed its validity.

The defendants finally contend that summary judgment should have been denied because a factual question exists as to whether the plaintiff has been injured or, as stated elsewhere in its brief, the plaintiff has suffered any damages. The carriers assert that under § 16(2) the findings and order of the Commission are only prima facie evidence of the facts asserted therein[14] and that they were entitled to rebut this prima facie case at a trial. We agree with the defendants that, if a material issue of fact existed concerning the amount of money due the plaintiff under the Com-

14. § 16(2) of the Act, 49 U. S. C. § 16(2), states in this regard:

> Suit suit [as authorized above when a carrier fails to comply with a Commission order for the payment of money] . . . shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, . . .

mission's order, the carriers would be entitled to ventilate their arguments at a trial. However, the defendants and the plaintiff stipulated the amount of the award that would be due the plaintiff if the Court believed that the plaintiff was entitled to judgment on the issue of liability. Because § 16(2) of the Act states that the trial shall proceed like other civil suits for damages, and because the parties' stipulations indicated that no material issue of fact existed which would preclude the granting of summary judgment under the normal application of the Federal Rules of Civil Procedure, we do not believe that any trial is necessary to determine the extent to which the plaintiff has been injured or damaged. Accordingly, this argument presents no valid ground for vacating our prior judgment.

We have reviewed all other grounds asserted by the defendants and do not believe them to be of merit. On the basis of this opinion and our prior opinion originally granting the plaintiff's motions for summary judgment, we conclude that the plaintiff is entitled to such judgment and that the defendants' motions for a new trial and to alter and amend judgment must be denied. An appropriate order will enter in each of these cases.

/s/ Hubert L. Will
United States District Judge

Dated: January 28, 1972.

Appendix D (4)

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois,
Eastern Division

ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation, *Plaintiff,* v.	
BURLINGTON TRUCK LINES, INC.	No. 70 C 1191
DOHRN TRANSFER COMPANY	No. 70 C 1192
I. & S. McDANIEL, INC.	No. 70 C 1193
INTERSTATE MOTOR FREIGHT SYSTEM	No. 70 C 1194
KNOX MOTOR SERVICE, INC.	No. 70 C 1195
ROCK ISLAND MOTOR TRANSIT	No. 70 C 1198
SPECTOR FREIGHT SYSTEM, INC.	No. 70 C 1199
YELLOW TRANSIT FREIGHT LINES, INC. *Defendant.*	No. 70 C 1200

MEMORANDUM OPINION
(Filed May 3, 1972)

The plaintiff in these actions is suing the various defendant motor carriers for refund of freight charges pursuant to orders of the Interstate Commerce Commission. The plaintiff presently moves for summary judg-

ments and, in each of these cases but one, the defendants move to dismiss the actions, or in the alternative, move for summary judgments in their favor based upon the same grounds by which they oppose the plaintiff's motions for summary judgment.[1]

The plaintiff has previously brought suit against three other motor carriers based upon the same orders of the Interstate Commerce Commission[2] and, in response to the plaintiff's motions for summary judgment in those cases, this Court ruled that the orders were valid and that the plaintiff was entitled to the refunds. Subsequent to that ruling, we denied the defendants' motions for a new trial and to alter and amend the judgments. Because the Court's memorandum opinions accompanying our rulings on those motions[3] plus the memorandum opinion granting plaintiff's motion for attorneys' fees[4] discuss much of the factual background and legal conclusions relevant to these lawsuits, we adopt and incorporate those opinions into this opinion by reference and we do not, therefore, repeat the factual background of this suit.

I

The defendants' initial grounds for opposing the plaintiff's motions for summary judgment are the same that their counsel took in response to the plaintiff's motions

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[1] The defendant in case No. 70 C 1194, Interstate Motor Freight System, has not moved to dismiss the complaint or for summary judgment in its favor.

[2] Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc., No. 70 C 1189 (N.D. Ill.); Aluminum Company of America v. Brady Motorfrate, Inc., No. 70 C 1190 (N.D. Ill.); Aluminum Company of America v. Poole Transfer, Inc., No. 70 C 1197 (N.D. Ill.).

[3] Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc., et al., 337 F. Supp. 674 (N.D. Ill. 1971).

[4] Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc., et al. (N.D. Ill. Nov. 30, 1971). This opinion has not been published. For a summary of its holding, see n. 31, *infra*.

for summary judgment in the three prior cases and, in support thereof, they incorporate all their briefs from the prior suits. We analyzed and considered these arguments in our prior opinions incorporated herein and, as there outlined, do not find them to be meritorious.

II

The defendants next assert grounds for opposing plaintiff's summary judgment motions which, the carriers claim, are "supplemental" to the grounds asserted by the defendant motor carriers in the three prior cases. Considering their prior briefs in opposition to plaintiff's original summary judgment motions in the three prior cases and their "supplemental" briefs in support of their motions to vacate the adverse judgments entered therein, the new "supplemental" briefs filed in these proceedings are the third attempt by counsel for the motor carriers to conjure up theories to aid their clients to abrogate their understanding with the Commission to roll back any charges collected from shippers during the Commission proceedings and which ultimately were not approved. Because each of these cases is a separate proceedings, however, we must consider the "supplemental" grounds asserted by the defendants herein.

The defendants' initial "supplemental" argument is that "the plaintiff seeks to have this Court give far greater vitality and effect to the purported 'order' of the Interstate Commerce Commission upon which plaintiff relied than was ever intended by that Commission." In support of this conclusion, the carriers submit copies of the brief of the United States and the Interstate Commerce Commission filed before the Denver three judge Court in *Admiral-Merchants Motor Freight, Inc., et al.* v. *United States*[5], wherein the motor carriers unsuccessfully sought to overturn the Commission's refund orders.

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[5] 321 F. Supp. 353 (D. Colo. 1971), aff'd, 404 U.S. 802 (1971).

The carriers contend that a perusal of the ICC brief indicates that the Commission, interpreting its own order, asserted before the three judge court that (1) the refund order was based upon duties of the carriers which arose under the common law doctrine of restitution and not under the Interstate Commerce Act and (2) such order would not be enforceable per se against the carriers under the doctrine of restitution without the carriers being provided an opportunity to challenge the equities in subsequent restitution proceedings. The carriers argue that with these assertions before it, the Denver Court's ruling on the validity of the ICC order was not intended to foreclose the carriers from later again challenging that order.

We have read the briefs submitted by the Government to the Denver Court and the carriers' description of them is at least arguable although the precise meaning of a subsequent "challenge of the equities" is unclear. Had the Denver Court ruled on the basis outlined in those briefs, the carriers' theory that they should now be entitled to submit evidence on the equities in the restitution suits might be appropriate. There are, however, two reasons why their theory is inapposite and why the Commission's view of the refund order is irrelevant to these proceedings.

First, the Denver Court, in ruling for the ICC and dismissing the carriers' complaint, specifically did not rely upon the Government's proferred theory of restitution as a basis for upholding the order. After noting the Government's theory of common law restitution, the Court responded that a legislative tribunal cannot exercise common law or equitable jurisdiction unless such power has been expressly granted to it by Congress, but that this consideration was immaterial because the Commission did *not* undertake to apply common law or equity

principles. Rather, it merely had imposed the refund order as a condition for granting an extension of time in the hearings on the proposed increases, a purely procedural matter which was clearly within its power. The Court continued:

> An even stronger argument for refusing to annul the Commission's order is the doctrine of equitable estoppel. We have in mind the principle which imposes an obligation on a person to live up to his representations or conduct in circumstances where inequitable consequences would result to persons having the right to rely, and who in good faith, did rely on the representations made. Applied to the case at bar the Commission certainly relied on the carriers' withdrawal of their jurisdictional objection to the refund condition. The Commission's reliance was evidenced by its failure to vacate the order. It did not have to anticipate that the carriers would renege. The carriers' withdrawal of their timely objection was a positive act which evidenced willingness to go along with the condition imposed.
>
> It can also be argued that there was a binding waiver on the part of the carriers resulting from their affirmative withdrawal of their objection . . .[6]

It is clear from this lengthy quote that the Denver Court ruled on a basis wholly apart from that suggested by the Commission and that the Commission's brief before that Court discussing its restitutional theory is immaterial in these proceedings.

The second reason why the ICC briefs in Denver are immaterial in these suits is that these are not restitution proceedings. In the three prior suits before this Court, we declined to reach the restitution issue and the plaintiff does not now attempt to raise it in its current motions for summary judgment. Its motions, rather, are based

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[6] *Admiral-Merchants*, supra n. 5, 321 F. Supp. at 359.

upon Sections 16(2) and 205(g) of the Interstate Commerce Act, 49 U.S.C. §§16(2), 305(g). The ICC's suggestion in Denver that the carriers could argue the equities in subsequent restitution suits, therefore, has no bearing on suits based upon a different jurisprudential basis.

In summary, it is apparent that the carriers' statements that the plaintiff seeks to have the Court give a greater vitality and effect to the refund order than was ever intended by the ICC is of no merit because (1) the Denver Court, whose holding was affirmed without opinion by the United States Supreme Court, rested its decision upon a basis wholly apart from the arguments submitted by the Commission and (2) these suits are *not*, in any event, restitution suits.

III

The carriers' next two "supplemental" grounds for denying plaintiff's motions for summary judgment are that Rule 15 of the Federal Rules of Civil Procedure cannot be utilized to revive causes of action which have expired prior to the time a plaintiff seeks to assert new theories for its cause of action and that, in any event, no claim for relief has been stated on the facts alleged. As these two grounds have been thoroughly discussed in our prior opinions incorporated herein, we need not again reiterate our reasons for concluding that these arguments are not meritorious.

In response to the carriers' suggestion that the plaintiff fails to state a claim for relief, we would only state for the third time during the course of this litigation that, contrary to the defendants' persistent characterization, the plaintiff's cause of action is not based upon a

theory of reparations[7], but is nothing more than a very arduous attempt on its part to compel the carriers to honor their end of the roll-back agreement which, as noted above, the Denver three-judge Court believed, as we do, the carriers are estopped from contesting. That the defendants continue to characterize the plaintiff's suits as an attempt to circumvent the burden that would be upon it in a statutory reparation proceedings, when everybody involved agrees that these are not such proceedings, can be considered as nothing more than a smoke screen to hide the plain fact that *the Supreme Court of the United States has affirmed a decision which states that the carriers are estopped from contesting and have waived their right to challenge the validity of the Commission refund order.*

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[7] The statutory suit for reparations by a shipper against a motor carrier is authorized by 49 U.S.C. §304a. In such a suit, the burden is upon the *shipper* to prove affirmatively to the Commission that the carriers' past-charged rates were unjust and unreasonable. The orders issued by the Commission which are contested herein were made in relation to a hearing ordered by the Commission pursuant to 49 U.S.C. §316(g) to inquire into the lawfulness of the new rates. Because the carriers are quired by §316(a) to establish only "just and reasonable" rates, the burden is upon the carriers to establish affirmatively in an inquiry into the lawfulness of the proposed rates that those rates are indeed just and reasonable. Middlewest Motor Freight Bureau v. United States, 433 F. 2d 212 (8th Cir. 1970), cert. denied, 402 U.S. 999 (1971); Accelerated Transport-Pony Exp., Inc. v. United States, 227 F. Supp. 815 (D. Vt. 1964), aff'd, 379 U.S. 4 (1964). Because the Commission proceedings involved herein were not reparation proceedings brought by shippers under §304a but were initiated by the Commission itself under §316(g), the only underlying finding that it made was that the *carriers* had failed to meet their burden to prove affirmatively that its rates were just and reasonable. The plaintiff has never sought reparations before the Commission or claimed that it is seeking reparations herein.

IV

The defendants' next argument in opposition to the plaintiff's motions for summary judgment is that the plaintiff seeks to assert herein the nonevidentiary findings made in *Admiral-Merchants Motor Freight, Inc., et al.* v. *United States, supra* n. 5, the Denver case, as res judicata against defendants herein who were not parties to that proceeding. The carriers argue that the Denver Court's refusal to enjoin the order was, at most, a mere recognition of the fact that "the Colorado Court could not have enjoined the order for it was not enforceable by its own provisions." (Defendants' supplemental memorandum, pp. 12-13). If, as the carriers suggest, this order was not enforceable under its own terms and this fact meant that the Colorado Court was incapable of enjoining it, we would be shocked that counsel for the carriers, wasting much of their clients' money, irresponsibly fought so diligently, both before the Colorado Court and the United States Supreme Court, to enjoin an order which couldn't be enjoined because it was not enforceable by its own provisions. The speciousness of this argument concerning the reason why the Denver Court refused to enjoin the Commission order is apparent on its face.

The carriers further state that the Colorado Court could not have made any findings concerning the carriers' purported waiver of their objection to the refund order because no such evidence was presented to it to support that finding other than the record of proceedings before the ICC. This suggestion is yet another attempt on their part to have this Court "review" the decision of the Denver Court after the Supreme Court has affirmed that decision. If the Denver Court erred in its

basis for refusing to enjoin the refund order—that basis being the doctrine of equitable estoppel and waiver—the place to attack that ruling as being based upon evidence outside the record before the Court was in the Supreme Court, not here.

Even were we willing to allow the carriers another attempt to review the Denver Court's factual determination, it is apparent that the finding of waiver and estoppel was based upon factual determinations made from the ICC record, which was before the Court, and not from any other source. Even in their brief filed herein, the carriers admit the existence of the specific factual occurrences which were the basis of the Denver Court's waiver and estoppel finding. Although stating that counsel for the carriers consistently maintained to the ICC that it would be illegal for the carriers to agree to the refund order, the carriers do acknowledge that they withdrew their objection to this order, although they obviously did it quite grudgingly because the Commission threatened to vacate its prior order postponing the hearing date, which delay would allow the carriers the time they needed to obtain the evidence in support of their proposed rate increases. This withdrawal of objection was the precise factual occurrence which appeared from the ICC record upon which the Denver Court based its waiver and estoppel finding. It is fatuous, therefore, for the carriers now to suggest that the Colorado Court only referred in dictum, and erroneously at that, to the *quid pro quo* received by the carriers for their withdrawal of their objection to the refund order. This finding, which is demonstrably correct from the ICC record before the Denver Court and the carriers' own admissions in this Court, is

an integral element of the direct holding of the Denver Court that the carriers had waived their objection to the refund order and were estopped from contesting its validity.

The carriers also contend that several of the eight defendants in these proceedings were not party plaintiffs in the Denver case and are not, therefore, bound under the concept of res judicata by that decision irrespective of that Court's factual determinations. We agree with these carriers that the doctrine of res judicata does not apply to them. The Supreme Court of the United States, however, has affirmed a decision which states that all carriers who were represented by the Middlewest Motor Freight Bureau, Inc., who were involved with the rate increases involved in ICC Docket No. 34971, and who withdrew their objections to the refund order have waived their objections and are estopped from contesting its validity. Based upon this Supreme Court decision and upon the fact that no suggestion is made that these few carriers were not part of the larger group who withdrew their objection to the refund order, these carriers, notwithstanding their lack of involvement in the Denver case, are estopped from so contesting the validity of the refund order because, under the doctrine of stare decisis, this Court must accept the Supreme Court's holding that all the carriers involved with these tariff increase

proceedings are estopped from contesting the validity of the Commission refund order.[8]

Notwithstanding the defendants' characterization to the contrary, it is manifest that the plaintiff is not attempting in its motions for summary judgment to introduce nonevidentiary findings of the Denver case as res judicata herein against defendants who were not parties to that proceeding because (1) those findings *were* evidentiary, being based upon the ICC record properly before that Court and (2) they are not being applied against the carriers under the doctrine of res judicata but under the doctrine of stare decisis. Were the carriers' position correct that they are not bound by the Supreme Court's affirmance of the decision which precludes the affected carriers from contesting the refund orders, the logical extension of this position would be that one carrier could sue to overturn an ICC order affecting thousands of carriers, and even after an adverse ruling affirmed by the Supreme Court, every other affected carrier could individually contest the validity of that order on a case by case basis until one carrier ultimately was successful. No rational utilization of limited court resources could tol-

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[8] While no doubt exists that the doctrine of res judicata estops only parties to a prior lawsuit, or their privies, from contesting an issue and reviewed in that prior suit, the doctrine of stare decisis governs the decision of the same question in the same way even in an action between total strangers to that prior suit. Utilities Production Corporation v. Carter Oil Company, 72 F. 2d 655, 662 (10th Cir. 1934); Stell v. Savannah-Chatham County Board of Education, 220 F. Supp. 667, 677 (S.D. Ga. 1963), rev'd on other grounds, 333 F. 2d 55 (5th Cir. 1964), cert. denied, 379 U.S. 933 (1964); Leake v. Jones, 18 FRD 80 (W.D. Okla. 1955); United States v. Lee's "Save the Baby," 37 F. 2d 137 (D. Conn. 1929). *Cf.*, Bienville Water Supply Company v. Mobile, 186 U.S. 212, 217 (1902). *See generally*, 21 C.J.S. Courts §188.

erate such an obvious judicial waste after the Supreme Court of the United States has upheld the validity of the order.[9]

Defendants' next "supplemental" ground for opposing plaintiff's summary judgment motions is that "summary judgment at this stage in the proceedings is premature and inappropriate since numerous substantial questions of material fact remain in the proceedings before a determination can be made regarding the plaintiff's right to recover." The defendants argue that, even assuming (1) the validity of the refund portion of the ICC order of June 5, 1969, as modified on August 29, 1969, and (2) that plaintiff may properly bring an enforcement action under 49 U.S.C. §§16(2) and 305(g), the defendants are nevertheless entitled to attack at a trial that portion of the Commission order which found that the increased rate of charges "have not been shown to be just and reasonable." For the first time in this overly-protracted litigation surrounding their roll-back agreement, the carriers now contest the validity of the hitherto unchallenged underlying portion of the ICC orders which held that the carriers had failed to meet their burden of proving that the new proposed rates were just and reasonable.[10]

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[9] *Cf.*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

[10] Although the Denver Court stated that the action therein was seeking review of the Commission orders and did not state that the action was seeking review only of the refund portion of the orders, it is clear that the carriers limited their challenge to only the refund portions of the orders and did not assert any error as to the underlying portion of the orders that denied the requested tariff increases. The Denver Court, accordingly, never passed judgment on that underlying determination for the simple and obvious reason that it was never asked so to rule. *See, Admiral-Merchants, supra,* n. 5, 321 F. Supp. at 354, 358.

The defendants' argument runs as follows: §16(2) of the Interstate Commerce Act provides that suits for the enforcement of Commission orders for the payment of money shall proceed in all respects like other civil suits for damages and that the Commission's orders for such payment and the findings contained in such order shall be prima facie evidence of the facts therein stated. Therefore, the carriers contend, they can now rebut the Commission's finding, which is only prima facie evidence so far as these suits are concerned, that they failed to meet their burden of proof and that the plaintiff's summary judgment motions are premature because they should be allowed to wait until a trial to present their rebuttal evidence.

The carrier's above contention cannot be accepted for several reasons. Initially, their failure to attach evidentiary affidavits in support of their claim that they did meet their burden of proof before the Commission[11] must be deemed fatal to their claim. Because the plaintiff's incorporation into its summary judgment motions of the Commission order shifts the burden to the carriers to overcome the presumptions it creates against them,[12] and because the carriers have failed to file affidavits which would support their general contention that they did meet their burden of proof because the Commission of proving that the proposed rates were reasonable, no ma-

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[11] The decision of the Commission of which the carriers here seek review was that the carriers failed to prove that the proposed rate increases were just and reasonable. The Commission did not specifically decide either that the rates were reasonable or that they were unreasonable.

[12] Baldwin v. Scott County Milling Co., 307 U.S. 478 (1939).

terial issue of fact exists as to the issue which would preclude granting the plaintiff's motions for summary judgment under normal application of Rule 56, Fed. R. Civ. P., notwithstanding the carriers' vague claim that the proposed rates were just and reasonable.[13]

This failure to submit affidavits, which alone would authorize summary judgment for the plaintiff,[14] is peculiarly significant in the context of these proceedings because of the Court's limited scope of review over the Commission's determination that the carriers failed to prove the reasonableness of their proposed rate increases. In *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*,[15] the Supreme Court articulated the standard of review of courts over Commission determinations in suits brought pursuant to 49 U.S.C. §16(2). The Court held that if the challenged Commission determination was one which would be required under the doctrine of primary jurisdiction[16] to be determined first by the Commission, those findings must be deemed conclusively correct in the case of judicial review in §16(2) proceed-

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[13] *See, e.g.*, Markwell v. General Tire and Rubber Company, 367 F. 2d 748 (7th Cir. 1966); Wagoner v. Mountain Savings & Loan Ass'n, 311 F. 2d 403, 406 (10th Cir. 1962); McPherson v. St. Paul Fire & Marine Insurance Co., 350 F. 2d 563 (5th Cir. 1965); Gifford v. Travelers Protective Ass'n, 153 F. 2d 209 (9th Cir. 1946); Wilkinson v. Powell, 149 F. 2d 335 (5th Cir. 1945). *Cf.*, Chapman v. United States, 139 F. 2d 327 (8th Cir. 1943); Pappas v. Bliss, 36 FRD 691 (W.D. Pa. 1965). See generally, 6 Moore's Federal Practice Pars. 56.11[3], 56.17[3], 56.22[2].

[14] See, Rule 56(e), Fed. R. Civ. P.

[15] 383 U.S. 576, 589-595 (1966).

[16] *See*, Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U.S. 247 (1913); United States v. Western Pacific R. Co., 352 U.S. 59 (1956).

ings except to the extent pointed out in prior direct review proceedings.

Because it is clear that the determination of the reasonableness of rates is one which fails within the primary jurisdiction of the Commission,[17] we conclude that the Commission's related determination that the carriers had failed to meet their burden of proving the reasonableness of their proposed rates likewise falls within the doctrine of primary jurisdiction because that determination, like all rate determinations, falls within that category of "issues of fact arising under a complex regulatory scheme outside [a court's] normal experience"[18] and is an "inquiry [that is] essentially one of fact and of discretion in technical matters" whose evaluation depends upon evaluation of "voluminous and conflicting testimony" that can only be accomplished by expert knowledge of the transportation industry.[19]

Once having determined that this issue does fall within the Commission's primary jurisdiction, *Atlantic Coast Line,* in niterpreting prior cases, makes clear the scope of review of federal courts over such determinations. The courts may "consider whether the Commission action exceeded constitutional power or right, whether the administrative order was within the scope of authority delegated and whether the exercise of authority was reasonable, but [the court cannot] 'usurp merely administrative functions by setting aside a lawful administrative order upon [the courts'] conception as to whether the

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[17] See cases cited n. 16, *supra.*

[18] Far East Conference v. United States, 342 U.S. 570 (1952).

[19] Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922).

administrative power has been wisely exercised. Power to make the order and not the mere expediency of wisdom of having made it is the question.' "[20]

Thus, our review of the Commission's order that the carriers had failed to meet their burden of proving the reasonableness of their proposed rates would, at most, be to determine if that finding was within the Commission's statutory powers[21] and if the order was supported by substantial evidence. The carriers notably have failed to indicate in what manner this Commission finding is unsupported by substantial evidence; they merely contend vaguely that after-the-fact evidence indicates that the rates they proposed ultimately proved to be reasonable. Considering the prima facie validity with which §16(2) clothes the Commission order, the extremely narrow scope of review which this Court could exercise in any event over the Commission's determination, and the lack of any evidentiary support by the carriers in support of their opposition to plaintiff's motions for summary judgment which could trigger our narrow scope of review, we do not believe that the carriers have successfully put into controversy the validity of the Commission's finding that they failed to meet their burden to prove the reasonableness of their proposed rates so as to create a material

[20] Interstate Commerce Commission v. Atlantic Coast Line R. Co., *supra* n. 15, at 593, quoting from Interstate Commerce Commission v. Illinois Central R. Co., 215 U.S. 452, 470 (1910). *See also*, Illinois Central R. Co. v. Norfolk & Western Ry., 385 U.S. 57 (1966); Consolo v. Federal Martime Commission, 383 U.S. 607 (1966); Locust Cartage Co. v. Transamerican Freight Lines, Inc., 430 F. 2d 334 (1st Cir. 1970).

[21] The carriers have never suggested that the Commission was without the power to determine whether or not their proposed rates were reasonable.

issue of fact on this issue. Accordingly, the plaintiff's motions for summary judgment cannot be denied because of this purported fact question.

Even if defendants did properly submit affidavits in support of their contested fact issue, we nevertheless believe that the resulting factual conflict would not be a *material* issue of fact so as to preclude summary judgment.[22] In the typical suit brought under §16(2) for reparations, the carriers may contest in court the underlying factual determinations made by the Commission that the moneys ordered to be paid to the shippers were collected through unjust or unreasonable rates. The instant Commission order, however, does not present the Court with this typical issue of a reparations suit because (1) the order issued by the Commission was not a reparations order[23] and (2) the carriers agreed, prior to the Commission hearing, to return the increased tariffs collected should the increases not be approved.[24]

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[22] Rule 56(c), Fed. R. Civ. P., authorizes the granting of summary judgment when there is no genuine issue of *material* fact.

[23] See n. 7, *supra*.

[24] The carriers again claim that they never agreed to the terms of the Commission order. The record is clear, however, that they did. After the Commission, in similar cases involving other carriers who needed time to develop their supporting evidence but who refused to agree to a similar refund order as a *quid pro quo* for an extension of the Commission hearing date, withdrew the prior-granted hearing postponement because it believed that the carriers should have been prepared and ready to submit evidence to prove the lawfulness of their proposed tariff charges at the time that the proposed charges were filed with the Commission, *see* Increased Rates and Charges, Pacific Inland Terr., 332 I.C.C. 845 (Feb. 14, 1969), and General Increase, Middle Atlantic and New England 332 I.C.C. 820 (Feb. 14, 1969), the carriers herein chose to withdraw their objections to the Commission order rather than be compelled to face immediately that body with no evidence to support their proposed tariff increases. This withdrawal of objection was the factual basis for the Denver court's conclusion, which is binding upon this Court, see Part IV of this opinion, *supra*, that the carriers agreed to the order.

As has been reiterated many times during the course of the proceedings herein and in Denver, the carriers, as a *quid pro quo* for a delay in the Commission hearing, did agree to the condition extracted by the Commission that, should that body ultimately not approve the proposed tariff increases, the carriers would refund that increment collected during the pendency of the administrative proceedings. The carriers did not agree to return the money only if the Commission did not approve the proposed tariffs *and* such disapproval were upheld after protracted court challenge; rather, they agreed to return the incremental receipts "to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission."[25]

Because the increases were not approved, the condition precedent for the return of the moneys has occurred and the carriers must now honor their agreement. Had the carriers protested this conditional agreement throughout all the Commission proceedings and not withdrawn their objection thereto only to raise it again after an adverse administrative decision, these proceedings would have presented an appropriate forum to raise their objections to the refund order *and* the underlying factual determination. Not having followed this course of action, however, it would not be appropriate for the carriers presently to be allowed the opportunity to contest the Commission action after they agreed to roll back the increased moneys collected should the Commission rule adversely to them and after that condition precedent for the refund has occurred.

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[25] ICC Order of April 25, 1968, Docket No. 34971.

Finally, even if the failure to submit affidavits concerning the underlying Commission determination regarding the reasonableness of the proposed rates were overcome and even if the carriers may not be deemed to have waived any objection to this underlying determination, the carriers nevertheless cannot now urge as invalid an aspect of the Commission order different than that previously urged as invalid before the Denver Court. Having once brought a review proceeding under §17(9) of the Act[26] challenging a portion of a Commission order on only one ground, a carrier must be deemed to have waived any objection to any other portion of the order not so challenged and cannot be allowed to controvert the remainder on a piece-meal basis. Accordingly, we conclude that the carriers herein have waived their right to contest the validity of the ICC order as it relates to the Commission's findings that the carriers had not met their burden of proving the justness and reasonableness of the proposed tariff increases because of their failure to raise this underlying ground for invalidity when they chal-

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[26] 49 U.S.C. §17(9). This section is made applicable to motor carriers through §§205(g) and (h) of the Motor Carrier Act, 49 U.S.C. §§305(g) and (h).

lenged the validity of the refund portion of that order before the Denver Court pursuant to §17(g) of the Act.[27]

Finally, the carriers contend that other fact issues exist which also preclude the granting of summary judgment, such as the issue of whether the plaintiff was the party to bear the increased freight charges or whether it passed such charges on to its customers in the form of price increases. Irrespective of whether these issues would be relevant in a statutory reparations suit or a common law restitution suit, such issues are totally irrelevant and immaterial to this suit seeking to compel the carriers to honor their agreement to refund the moneys.

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[27] *See* n. 10, *supra*. The Court recognizes that, as a general matter, this finding of waiver could not be applied against the few defendants who were not party to the Denver proceedings because the doctrine of waiver generally requires actual participation on the part of the parties to be charged. We believe, however, that the opportunity for this doctrine as it is generally applied to be perverted is quite significant when, as here, a large number of carriers are represented by the same counsel who file all the court suits, complaints, briefs, motions, etc. in all the litigation concerning a particular Commission proceeding and the designated party plaintiffs in a suit to overturn the controverted Commission order are selected by counsel for the larger group. Counsel can select only one or two of the affected carriers as party plaintiffs in that suit, which would secure all the benefits to all affected carriers should that suit succeed, but which would bind under the waiver doctrine only the few named party plaintiffs should the Commission ultimately prevail in that suit. We do not, however, have to reach this difficult application of the doctrine of waiver as to the few carriers who were not involved in the Denver case because of our conclusions concerning the failure of all defendants herein to file affidavits in opposition to the summary judgment motions, because of our determination that the primary jurisdiction doctrine provides only for a narrow scope of review over the Commission order which has not been activated by anything proferred by the defendants, and because of our conclusions that the carriers' agreement to roll back the increased charges if and when the Commission ruled adversely on the proposed increases precludes their challenging that order and its underlying findings.

The only factual issue which could be before the Court is the *amount* of moneys owed by the carriers to the plaintiff, but this issue has been stipulated to and is the only factual issue which the defendants do not contest.

Based on the above, we conclude that, contrary to the carriers' suggestion, summary judgment is not premature at this stage of these proceedings because no material issue of fact exists which the carriers may contest or have contested.

VI

In their motions for summary judgment, the plaintiff has asked for interest on the refunds due from each defendant from the date of the first effective refund order entered by the Commission.[28] In opposition to this request, the carriers contend that the Commission order relied upon by the plaintiff does not provide by its terms or otherwise for interest to be collected from the time of its entry antecedent to a judgment by a court of law and that plaintiff's prayer, therefore, is manifestly outside of the terms of the very order upon which it relies.

While the carriers are correct that the order does not state that interest shall accrue if the carriers refuse to comply with its terms, it is nevertheless clear that §16(2)

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[28] In its order of June 5, 1969, the Commission, after announcing its finding that the carriers had not shown the proposed tariffs to be just and reasonable, stated:

> [T]he respondents [the carriers participating in the tariffs under investigation] be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases found not shown to be just and reasonable. I.C.C. Order of June 5, 1969, Docket No. 34971.

of the Interstate Commerce Act, the statute upon which plaintiff relies, represents the Congressional policy of encouraging the prompt payment of moneys ordered by the Commission to be paid.[29] If interest accruing from the date of an ignored Commission order were to be denied, the carriers could have the use of the money that belongs to the shipper(s) for so long as they can delay and contest the Commission order, which possibility surely would tend to discourage prompt payment of Commission orders for the payment of money in direct contradiction of Congressional policy. In the instant case, for example, this period of delay has already been protracted by the carriers for almost three years since the Commission first ordered them to return the moneys that plaintiff is here seeking. In addition, without such interest award, there is no way that the shippers could be made whole after the carriers herein have reneged on their agreement to roll back the unapproved portion of the increased tariffs collected. Accordingly, we conclude that the shippers are entitled to interest on the refunds due from each defendant at the rate of 6% from the date of the first effective Commission refund order, June 5, 1969.[30]

VII

The plaintiff has prayed for attorneys' fees in these suits. As we indicated in our prior opinions incorporated

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[29] Interstate Commerce Commission v. Atlantic Coast Line R. Co., *supra* n. 15, 383 U.S. at 595.

[30] *Cf.*, Pennsylvania R. Co. v. Minds, 250 U.S. 368, 371 (1919); Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 204, 240 (1925); City of Danville v. Chesapeake & Ohio R. Co., 34 F. Supp. 620 (W.D. Va. 1940).

herein, we are of the belief that it is entitled to secure reasonable attorneys' fees pursuant to 49 U.S.C. §16(2).[31] The carriers have objected to the fees requested by the plaintiff on the ground that, even if our legal conclusion is correct, the amount of these requested fees is so exorbitant that, if they were granted, they would constitute a fine and forfeiture far beyond the contemplated award conceived by Congress.

We disagree with the carriers' contention that the mere fact the requested attorneys' fees almost equal the amount of the underlying claims renders them invalid. The Congressional scheme of providing for attorneys' fees was to discourage carriers from disregarding Commission orders for the payment of money by compelling them to pay the shipper's costs of bringing a successful enforcement suit. If the carriers honored the order and did not contest it, there would not be any attorneys' fees at all. As they become increasingly belligerent in resisting a shipper's enforcement claim, however, the shipper's attorneys' fees obviously will continue to increase in size with no relationship at all to the amount of the underlying claim contained in the Commission order. The carriers' logic is incredible indeed when they suggest that the plaintiff's requested attorneys' fees should be disallowed merely because they (the carriers) have compelled plaintiff, through protracted litigation, to incur extensive attorneys' fees

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[31] In our memorandum opinion of November 30, 1971, in Aluminum Company of America v. Admiral-Merchants Motor Freight, Inc., et al., *supra* n. 4, we rejected the carriers' suggestion that even if the right to sue created by 49 U.S.C. §16(2) was incorporated into 49 U.S.C. §305(g), §16(2)'s authorization for reasonable attorneys' fees for a prevailing plaintiff bringing suit under that section was not also incorporated and granted the plaintiff reasonable attorneys' fees.

in its attempt to collect the moneys ordered by the Commission to be paid.

Notwithstanding our disagreement with the carriers, we nevertheless are presently unable to award attorneys' fees to the plaintiff because of a dearth of relevant information before the Court. In the first three cases previously concluded, we awarded fees on a basis significantly different from that suggested herein and in amounts that all parties agreed were reasonable attorneys' fees. If and when the plaintiff provides the Court with a breakdown of costs, attorney hours, and rates as was provided in the three previous cases, we shall enter an award for reasonable attorneys' fees.

VIII

Based upon all of the above and upon our prior opinions incorporated herein, we believe that the defendants' purported grounds in opposition to the plaintiff's motions for summary judgment are not meritorious and that the plaintiff's motions are well founded. Accordingly, the defendants' motions to dismiss or for summary judgment must be denied and the plaintiff's motions for summary judgment must be granted. Counsel for the plaintiff shall prepare within short date an order consistent with the foregoing for each of the eight pending cases.

/s/ Hubert R. Will
United States District Judge

Dated: May 3, 1972

Appendix D (5)

In the
United States Court of Appeals
For the Seventh Circuit

September Term, 1972 — September Session, 1972

Nos. 72-1264, 72-1265, 72-1266, 72-1505, 72-1506, 72-1507, 72-1508, 72-1509, 72-1510, 72-1511, 72-1512

ALUMINUM COMPANY OF AMERICA,
Plaintiff-Appellee,
v.
ADMIRAL MERCHANTS MOTOR FREIGHT, INC.,
BRADY MOTORFRATE, INC.,
POOLE TRANSFER, INC.,
BURLINGTON TRUCK LINES, INC.,
DOHRN TRANSFER CO.,
I & S McDANIEL, INC.,
INTERSTATE MOTOR FREIGHT SYSTEM,
KNOX MOTOR SERVICE, INC.,
ROCK ISLAND MOTOR TRANSIT CO.,
SPECTOR FREIGHT SYSTEM, INC.,
and
YELLOW TRANSIT FREIGHT LINES, INC.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 C 1189
No. 70 C 1190
No. 70 C 1197
No. 70 C 1191
No. 70 C 1192
No. 70 C 1193
No. 70 C 1194
No. 70 C 1195
No. 70 C 1198
No. 70 C 1199
No. 70 C 1200

Hubert L. Will
Judge.

Argued October 17, 1972—Decided July 12, 1973

Before Duffy, *Senior Circuit Judge;* Fairchild, *Circuit Judge,* and Grant, *Senior District Judge.**

*Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

D-55

72-1264, 72-1265, 72-1266, 72-1505, 72-1506, 72-1507, 72-1508, 72-1509, 72-1510, 72-1511, 72-1512

Grant, *District Judge*. These are consolidated appeals by various defendant motor carriers from summary judgments entered in favor of the plaintiff-shipper, Aluminum Company of America, in separate enforcement proceedings brought by the shipper to obtain refunds of excess freight charges. The Interstate Commerce Commission had previously ordered the refunds to be paid by the defendant motor carriers to shippers such as the plaintiff and that refund order had been upheld by a three-judge court in Colorado and subsequently upheld by the United States Supreme Court on appeal per curiam. *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F. Supp.353 (D.Colo. 1971), *aff'd*, 404 U.S. 802 (1971).

In the spring of 1968, the Middlewest Motor Freight Bureau, on behalf of its members, including the appellant carriers, filed and published proposed rate increases to take effect on 1 April 1968. The I.C.C. had allowed the rates to go into effect on this date but, because of protests by various shippers that the increased rates would be unjust and unreasonable, had instituted an investigation, without suspension, of the lawfulness of the increased rates. The Commission ordered evidence to be filed and set the matter for hearing on 20 May 1968. Two government agencies and the appellants requested a continuance of the evidence filing date and the hearing date on the grounds that the evidence could not be prepared in time. The I.C.C. granted the carriers' request for a continuance and rescheduled the hearing for 19 August 1968. This continuance, however, was subject to the express condition that in the event that any of the increased rates were not ultimately approved by the Commission,[1]

[1]The order granting the continuance read, in pertinent part, as follows:

It is further ordered, That the time for filing the requested information and supporting data be, and, it is hereby extended to August 5, 1968; that the hearing be, and it is hereby postponed to August 19, 1968, conditioned upon respondents' compliance with the refund provision ordered below . . .

the carriers would then be required to make refunds of all such increases collected on shipments moving after 20 May 1968. The appellant carriers had originally objected to the conditional refund provision but withdrew the objection after realizing that the Commission had, in similar cases, when confronted with a refusal of carriers to comply with a refund condition, denied the carriers' requested continuance of the hearing. On 5 June 1969 the Commission found that the increased rates and charges had not been shown by the carriers to be just and reasonable, ordered them cancelled, and reiterated the refund language of its original order granting the continuance of the hearing:

> *It is further ordered,* That, in accordance with the order entered herein on April 25, 1968, the respondents be, and they are hereby, required to refund to shippers the charges on shipments moving after May 20, 1968, to the extent that such charges included the increases found not shown to be just and reasonable. Increased Rates and Charges, From, To and Between Middlewest Territory, 335 I.C.C. 142 (June 5, 1969).

The appellants subsequently petitioned the Commission to reconsider and vacate the refund order. On 29 August, 1969, the Commission entered its final order denying the petition and further ordered the carriers, in accordance with the Commission's decision of 5 June 1969, to "make refund to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence."[2]

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[1] (Continued)

And it is further ordered, That respondents be, and they are hereby, ordered to make refunds to the shippers on any shipment moving after May 20, 1968, to the extent that the increases or any portion thereof under investigation herein are not approved by the Commission. Increased Rates and Charges, From, To and Between Middlewest Territory, I.C.C. No. 34971 (Order of April 25, 1968).

[2] Increased Rates and Charges, From, To, and Between Middlewest Territory, I.C.C. No. 34971 (Order of August 29, 1969).

72-1264, 72-1265, 72-1266, 72-1505, 72-1506, 72-1507, 72-1508, 72-1509, 72-1510, 72-1511, 72-1512

Plaintiff filed its complaint in the district court originally alleging claims for statutory reparations arising under 49 U.S.C. §304a, with jurisdiction asserted under 28 U.S.C. §1337. However, on 7 May 1971, the plaintiff moved for summary judgment asserting new claims for enforcement of the Commission's refund order pursuant to Section 16(2) of the Interstate Commerce Act, 49 U.S.C. §16(2).[3] Plaintiff had alleged in its motion for summary judgment that the refund order of the Commission was a final administrative order subject to the provisions of Section 205(g) of Part II of the Interstate Commerce Act, 49 U.S.C. §305(g), which provides in pertinent part as follows:

> Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission under chapter 1 . . . .[4]

In effect, plaintiff argued, and the district court held, that Section 16(2) of Part I of the Interstate Commerce Act was incorporated into Section 205(g) of Part II of the Act, thereby providing plaintiff with a statutory remedy for enforcement of the Commission refund order.

---

[3]Section 16(2) of Part I of the Act, 49 U.S.C. §16(2), provides in part as follows:

> If a carrier does not comply with an order for the payment of money within the time limit in such order . . . , any person for whose benefit such order was made, may file in the district court of the United States . . . , a complaint setting forth briefly the causes for which he claims damages, and the order of the commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages . . .

[4]Part I of the Interstate Commerce Act concerns railroads whereas Part II deals with motor carriers.

72-1264, 72-1265, 72-1266, 72-1505, 72-1506, 72-1507, 72-1508, 72-1509, 72-1510, 72-1511, 72-1512

> Section 205(g) of Part II of the Interstate Commerce Commission Act, 49 U.S.C. §305(g), provides that any final order made under Part II, which deals with motor carriers, "shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Chapter I (which deals with railroads)." Because no doubt exists that we are dealing with a final order made under Part II of the Interstate Commerce Act and because we have concluded above that the plaintiff is a party in interest to such order, we must, therefore, look to Part I of the Act to determine the scope of the plaintiff's rights.
>
> * * * *
>
> While no doubt exists that . . . Section [16] was designed originally to cover orders by the Commission in reparations situations, no reason appears why the valid order of the I.C.C. involved herein for the payment of money, which order clearly is covered under the language of the statute quoted above, should not also be deemed within the purview of this section. *Aluminum Co. of Amer. v. Admiral Merch. Motor Frgt., Inc.*, 337 F. Supp. 674, 681 (N.D.Ill. 1972).

The defendants, though denying any liability for a refund, stipulated the amount of refund of freight charges to which the plaintiff would be entitled in each case should the district court conclude that plaintiff was entitled to a refund under the order of the Commission. With this underlying factual stipulation, the district court proceeded to find the legal issues against the carrier and granted plaintiff's motion for summary judgment. 337 F. Supp. at 682.

Appellants assert numerous arguments on appeal, many of which were presented to and effectively disposed of by the district court. We shall only treat those arguments which we consider as having some residual merit.

Defendants contend, inter alia, that the Commission's refund language was entered in excess of its jurisdiction and,

therefore, is unenforceable. Though recognizing the existence of the holding of the court below that the Colorado three-judge court had conclusively determined the validity of the refund order, thereby precluding all argument on that issue, defendants argue that "the defense of invalidity of an order in an enforcement action is one which must be considered by the enforcement Court," citing *United States v. Southern Ry.*, 250 F.Supp. 759, 767 (D.S.C. 1966). However, as correctly noted by plaintiff-appellee, in the *Southern Ry.* case there had been no prior proceedings to review the order of the Commission sought to be enforced by the United States. In the instant case, the refund order has been subjected to review and its validity established by the Colorado three-judge court.

Defendants half-heartedly argue that the refusal of the three-judge panel to enjoin the Commission's refund order did not constitute a finding that the order was valid. The assertion of this argument requires, as the court below concluded, a "myopic reading of the opinion" of the Colorado three-judge court. 337 F. Supp. at 678. The statement of issues given by the three-judge panel negates any argument that the court was not concerned with the validity of the Commission's refund order:

> We must decide whether an order of the Commission in which a rate increase is denied, which order directs repayment of interim rates, if determined to be invalid, and which refund order was entered by the Commission as a condition of granting an extension of time to the carriers at their request, is invalid and subject to a judgment annulling the same . . . . *We are limited to the propriety and validity of a conditioned rate refund order,* which order was tacitly or impliedly (by withdrawal of objection) accepted by the carriers, plaintiffs herein. (Our emphasis.) *Admiral-Merchants Motor Freight, Inc., supra,* 321 F. Supp. at 358.

Admittedly, some of the defendant-carriers whose appeals have been consolidated with the instant appeal were not named

plaintiffs in the Colorado action and thus an argument might be made that, as to them, res judicata does not apply. However, as argued by the plaintiff-appellee, those defendant-carriers who were not named plaintiffs in the Colorado proceedings were undoubtedly in privity with the 60 named carrier-plaintiffs, particularly since all of the carriers involved were members of the Middle West Motor Freight Bureau, Inc., and therefore are still bound under the doctrine of res judicata.[5] Moreover, we are persuaded that the doctrine of stare decisis would also be applicable. We need only cite and adopt the following language of the district court:

> The Supreme Court of the United States, however, has affirmed a decision which states that all carriers who were represented by the Middlewest Motor Freight Bureau, Inc., who were involved with the rate increase involved in ICC Docket No. 34971, and who withdrew their objections to the refund order have waived their objections and are estopped from contesting its validity. Based upon this Supreme Court decision and upon the fact that no suggestion is made that these few carriers were not part of the larger group who withdrew their objection to the refund order, these carriers, notwithstanding their lack of involvement in the Denver case, are estopped from so contesting the validity of the refund order because, under the doctrine of stare decisis, this court must accept the Supreme Court's holding that all the carriers involved with these tariff increase proceedings are estopped from contesting the validity of the Commission refund order. *Aluminum Co. of Amer. v. Burlington Truck Lines, Inc.*, Civil No. 70 C 1191, N.D.Ill., May 3, 1972; Supp. Appendix 186, 187.

The only real issue in the instant appeal is whether the Commission's refund order is enforceable as an order to pay

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[5] See excellent discussion by Judge Hunter in *The Procter and Gamble Company v. Byers Transportation Company, Inc.*, No. 18,829-4 (W.D. Mo. 1973).

money within Section 16(2) of the Interstate Commerce Act. As stated previously, the district court held that Section 205(g) of Part II of the Interstate Commerce Act, 49 U.S.C. §305(g), incorporated Section 16(2) of Part I of the Act and thereby provided plaintiff with a statutory remedy for enforcement of the refund order. 337 F.Supp. at 681. Defendants argue that "since the Congress chose to not give the I.C.C. power to enter orders for the payment of money against motor carriers (there being no Sections 8, 9 or 13(1) in Part II of the Act) there was no reason to incorporate a provision for enforcement of such orders into Part II of the Act." Defendants further argue that there is a complete lack of any evidence indicating a Congressional intent to create, in Part II of the Act, causes of action for shippers against motor carriers. They note that (a) the legislative history of §305(g) is devoid of any such Congressional intent; (b) the Commission has made numerous attempts to influence Congress to pass legislation similar to Sections 8, 9, 13(1) and 16 to be added to Part II; and (c) there is not a single case in which Section 305(g) was utilized to create a cause of action by incorporation of Section 16. Defendants also place considerable reliance upon *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959) in which the United States Supreme Court held that the Motor Carrier Act did not provide shippers with a statutory right to collect reparations from carriers for recovery of allegedly unreasonable past rates.[6] In particular, defendants rely upon the following statements:

> The very provisions of Part I, and their counterparts in Part III, which give a right of action to shippers against carriers for damages incurred by carrier violations of the Act and provide the mechanics for the enforcement of that right are conspicuously absent in the Motor Carrier Act. Thus, whereas §8 of Part I provides that "any common carrier subject to the provisions of this chapter

[6]Shippers were subsequently granted a limited right to reparations against motor carriers when Congress amended §304a of Title 49 in 1965. See generally, 1965 U.S. Code Cong. and Ad. News, p. 2923.

> [who] shall do . . . any act . . . in this chapter . . . declared to be unlawful . . . shall be liable to the person or persons injured thereby for the full amount of the damages sustained . . . ." Part II has no comparable provision. Again, whereas §9 of Part I gives an injured shipper the right to sue in the I.C.C. or in the Federal District Court, Part II contains no comparable provision. In addition, §§13(1) and 16 of Part I give a shipper claiming reparation the right to proceed in the Commission and to enforce his reparation award in the courts, and Part II contains no comparable provisions. 359 U.S. at 470-471.

Defendants' reliance is misplaced. The *T.I.M.E.* decision is clearly distinguishable since it involved the shippers' right to reparations not their right to enforce a valid refund order. As stated by Judge Will in the court below, "in no sense did the *T.I.M.E.* decision consider the issue of whether, when the Commission does issue a valid refund order under Part II, the shippers for whose benefit the order was issued can proceed under Section 16(2) of Part I."[7] Admittedly, there is a dearth of legislative history and/or cases to which the court might look for assistance in interpreting §305(g). Nevertheless, the plain language of the statute[8] provides ample basis for the district court's conclusion that the statute incorporates §16(2) of Part I: "Any final order made under [Part II] shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under [Part I]." 49 U.S.C. §305(g).

We are mindful of the fact that the Commission, "as a generally accepted procedure,"[9] does not have statutory authority to order the payment of refunds under the Motor Carrier Act and that the refund order in question was only

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[7] 337 F.Supp. at 682.

[8] *United States Gypsum Company v. United States*, 253 F.2d 738, 744 (7th Cir. 1958).

[9] *Admiral-Merchants Motor Freight, Inc., Supra*, 321 F.Supp. at 359.

justified on the basis of the Commission's procedural powers, coupled with the equitable estoppel and waiver conditions which were found to exist by the three-judge panel.[10] Moreover, we recognize that the Colorado court expressly stated that it was not determining the enforceability of the refund order and that it was not commending the procedure, *i.e.*, the conditional refund order issued by the Commission, "as one which should be or could be practiced . . . ."[11] Nevertheless, the court did establish the validity of the order and its decision was affirmed by the Supreme Court. And, like the district court below, we know of "no reason . . . why the valid order of the I.C.C. involved herein for the payment of money . . . should not . . . be deemed within the purview of . . . section [16(2)]."[12]

Defendants assert that numerous unresolved and contested issues of material fact remained for decision when summary judgment was granted, including whether or not the rates involved were historically just or reasonable and the validity of the Commission's "not shown" finding.

We question the relevancy of the historical reasonableness of the rates inasmuch as the Commission's original refund order, as noted by the plaintiff-appellee in its brief, "was conditioned on whether 'the increases or any portions thereof under investigation herein are not approved by the Commission.' Appendix 212,"[13] rather than the historical reasonableness of the rates. More importantly, we note, with reference to all of the alleged unresolved issues of material fact, that the defendant carriers failed to file any counter-affidavits even though Section 16(2) states that "the findings and order of the Commission shall be prima facie evidence of the facts stated therein . . . ."[14] The district court correctly considered the defendants' failure to

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[10] *Ibid.*
[11] *Id.* at 360.
[12] 337 F.Supp. at 681.
[13] Brief for Appellee, p. 22.
[14] 49 U.S.C. § 16(2)

file counter-affidavits in support of their claim that they did meet their burden of proof before the Commission as being fatal to such claim.[15] We find without merit defendants' remaining contentions concerning the existence of other alleged unresolved issues of material fact.

Finally, defendants argue that several jurisdictional conditions precedent to the maintenance of an enforcement suit pursuant to Section 16 were not present. However, with one exception, we find little merit in any of the alleged "jurisdictional conditions precedent." As for the exception, defendants argue that no time had been set forth in the order on or before which compliance was required and that the absence of this jurisdictional prerequisite precludes enforcement, citing *Missouri Pacific Railroad Company v. Austin*, 292 F.2d 415, 417, 418 (5th Cir. 1961) and, in particular, *Railroad Yardmasters v. Indiana Harbor Belt R. Co.*, 166 F.2d 326, 329 (7th Cir. 1948). The latter case involved an action brought to enforce an order of the National Railroad Adjustment Board issued under the Railway Labor Act. The Board had entered an award after an administrative hearing, in favor of the yardmasters' union, holding that the railroad had violated seniority provisions of the union's employment contract. The Board also ordered the railroad to make the award "effective". Upon the failure and refusal of the railroad to do so, the union commenced its enforcement suit.

The statute granting the right of enforcement read, in pertinent part, as follows:

> If a carrier does not comply with an order of a division of the Adjustment Board *within the time limit in such order*, the petitioner . . . may file in the District Court of the United States . . . a petition setting forth briefly the

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[15] *Aluminum Co. of Amer. v. Burlington Truck Lines, Inc., supra;* Supp. Appendix 189-193; see Rule 56(e), F.R.Civ.P.

> causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. (Our emphasis.)[16]

In affirming the district court's dismissal of the union's complaint, the reviewing court stated as follows with reference to the "time limit" language of the statute: "In view of this unambiguous language, we are not able to discern either the authority of the beneficiary of an award to seek its enforcement or the jurisdiction of the court to entertain such action in the absence of a time limit contained in the order."[17] The court proceeded to hold that the

> . . . plaintiff's right to enforcement as well as the court's jurisdiction is dependent upon Par. (p), and clearly such authority and jurisdiction is conferred only on the contingency of non-compliance within the time limit provided in the order. It is our conclusion that an action for enforcement cannot be maintained upon an order which fixed no time limit for compliance.[18]

Appellants argue that because the statute in question contains almost identical language, the same interpretation and conclusion should be applicable, *i.e.*, "that an action for enforcement cannot be maintained upon an order which fixes no time limit for compliance." We disagree. The refund order in the case at bar, while functioning as an order for the payment of money within the scope of § 16(2), is predicated upon the procedural authority of the Commission rather than any express statutory authority such as provided by § 16(1) of the Interstate Commerce Act or § 153(o) of the Railway Labor Act.[19] Thus,

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[16] 45 U.S.C. § 153(p).

[17] 166 F.2d at 329.

[18] *Ibid.*

[19] Both of these statutory provisions, while expressly authorizing the appropriate administrative agency to enter refund orders, also explicitly require that the orders contain a time limit for compliance.

there was no statutory requirement that a refund order issued pursuant to this procedural authority contain a time limit for compliance.

We note also that in the *Railroad Yardmasters* case, a major reason attributed by the court for the statutory requirement that refund orders include a time limit for compliance was to ensure that both shippers and carriers could determine with certainty not only when the carriers were "in default and subject to an enforcement suit but also when the limitation period for such suit would expire."[20] However, in the case at hand, the defendant-carriers and the plaintiff-shippers could easily have determined these limitation periods since the applicable statute of limitations requires that "a complaint for the enforcement of an order of the commission for the payment of money shall be filed . . . within one year from the date of the order, and not after."[21] This statute of limitations also provides ample protection for the defendant-carriers against any stale claims shippers might now attempt to assert. For these reasons, we find the *Railroad Yardmasters* case distinguishable.

We remind defendants that we are concerned with plaintiff's "right of relief,"[22] *i.e.*, its right to enforcement of the refund order, and not its compliance with technical requirements of questionable applicability. We find it inappropriate for the defendants who had initially agreed to comply, "impliedly (by withdrawal of objection)"[23] if not expressly, but later refused to comply, with the conditional refund order of the Commission, to now assert the Commission's failure to include a time limit for compliance in the refund order as precluding enforcement of the order. Having

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[20] *Railroad Yardmasters, supra,* 166 F.2d at 329.
[21] 49 U.S.C. §16(3) (f).
[22] 49 U.S.C. §305(g).
[23] 321 F.Supp. at 358.

accepted the benefits afforded by the continuance of the rate hearing, defendants should now be required to provide the agreed-upon exchange – the *quid pro quo*.

The judgment of the district court is AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix D(6)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 12, 1973

Before
Hon. F. RYAN DUFFY, Sr. Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. ROBERT A. GRANT, Chief District Judge*

ALUMINUM COMPANY OF AMERICA,
Plaintiff-Appellee,

No. 72-1264, 72-1265, 72-1266, 72-1505, 72-1506, 72-1507, 72-1508, 72-1509, 72-1510, 72-1511, 72-1512

vs.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ADMIRAL MERCHANTS MOTOR FREIGHT, INC.,	70 C 1189
BRADY MOTORFRATE, INC.,	70 C 1190
POOLE TRANSFER, INC.,	70 C 1197
BURLINGTON TRUCK LINES, INC.,	70 C 1191
DOHRN TRANSFER CO.,	70 C 1192
I & S McDANIEL, INC.,	70 C 1193
INTERSTATE MOTOR FREIGHT SYSTEM,	70 C 1194
KNOX MOTOR SERVICE, INC.,	70 C 1195
ROCK ISLAND MOTOR TRANSIT CO.,	70 C 1198
SPECTOR FREIGHT SYSTEM, INC., and	70 C 1199
YELLOW TRANSIT FREIGHT LINES, INC.,	70 C 1200

Defendants-Appellants.

*Hon. Robert A. Grant, Chief District Judge of the U.S. District Court for the Northern District of Indiana is sitting by designation.

Nos.
72-1264, 72-1265
72-1266, 72-1505
72-1506, 72-1507
72-1508, 72-1509
72-1510, 72-1511
72-1512

9-12-73

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled causes, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled causes be and the same is hereby denied.

Appendix D(7)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 12, 1973

Before
Hon. F. RYAN DUFFY, Sr. Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. ROBERT A. GRANT, Chief District Judge*

ALUMINUM COMPANY OF AMERICA,
Plaintiff-Appellee,

No. 72-1264, 72-1265 vs.
72-1266, 72-1505
72-1506, 72-1507
72-1508, 72-1509
72-1510, 72-1511
72-1512

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ADMIRAL MERCHANTS MOTOR FREIGHT, INC., — 70 C 1189
BRADY MOTORFRATE, INC., — 70 C 1190
POOLE TRANSFER, INC., — 70 C 1197
BURLINGTON TRUCK LINES, INC., — 70 C 1191
DOHRN TRANSFER CO., — 70 C 1192
I & S McDANIEL, INC., — 70 C 1193
INTERSTATE MOTOR FREIGHT SYSTEM, — 70 C 1194
KNOX MOTOR SERVICE, INC., — 70 C 1195
ROCK ISLAND MOTOR TRANSIT CO., — 70 C 1198
SPECTOR FREIGHT SYSTEM, INC., — 70 C 1199
and
YELLOW TRANSIT FREIGHT LINES, INC., — 70 C 1200
Defendants-Appellants.

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*Hon. Robert A. Grant, Chief District Judge of the U.S. District Court for the Northern District of Indiana is sitting by designation.

Nos. 9-12-73
72-1264, 72-1265
72-1266, 72-1505
72-1506, 72-1507
72-1508, 72-1509
72-1510, 72-1511
72-1512,

This matter comes before the Court on the motion of Aluminum Company of America ("ALCOA"), Plaintiff-Appellee herein to tax costs including a reasonable attorney's fee and the defendants-appellants' memorandum in opposition to said motion. On consideration whereof,

IT IS ORDERED that (1) pursuant to Rule 39 costs shall be taxed in favor of plaintiff-appellee and against defendant-appellant in the amount of nine hundred ninety-three dollars and seventy cents ($993.70/100) and (2) pursuant to 49 U.S.C. § 16(a) the sum of one thousand and five hundred dollars ($1,500.00/100) shall be allowed to plaintiff-appellee as an attorney's fee for services on appeal, to be included in the taxation of costs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-669

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 19, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-669

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., ET AL.,
Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Aluminum Company of America, respectfully requests that the petition for writ of certiorari filed herein by petitioners be denied. As pointed out hereinafter in this brief, the issues of law involved in this case are simple, have been clearly defined by previous decisions of this and lower appellate courts, and there are no conflicts with decisions of other courts on the same matter.

QUESTIONS PRESENTED

Respondent does not agree with the statement of questions set forth at page two of the petition for certiorari. Questions numbered 2 and 3 have been heretofore litigated and decided by this Court in

Admiral-Merchants Motor Freight, Inc. v. *United States,* 404 U.S. 802, 30 L.Ed.2d 37, 92 S. Ct. 51 (1971). The remaining question as to whether Section 16(2) of the Interstate Commerce Act has been incorporated into the Motor Carrier Act so as to establish a private cause of action for enforcement of an I.C.C. order for the payment of money, is so clearly established that it does not warrant further consideration from this Court.

STATEMENT OF THE CASE

Following hearing and investigation, the Interstate Commerce Commission entered an order on June 5, 1969, which denied freight rate increases charged by the member motor carriers of the Middle West Motor Freight Bureau, Inc. Among other things, the Commission found that the increases in freight rates had not been shown to be just and reasonable.

Effective April 1, 1968, and prior to hearing before the Commission, the motor carriers had been collecting the increased charges from shippers, including respondent Aluminum Company of America. The Commission's order of June 5, 1969, ordered that the carriers refund to shippers the charges on shipments moving subsequent to May 20, 1968, to the extent that "such charges included the increases herein found not shown to be just and reasonable." *Increased Rates and Charges From, To and Between Middle West Territory,* 335 I.C.C. 142. Thereafter, following petitions for reconsideration, the Commission affirmed its order requiring the motor carrier to make refunds to shippers presenting their claims to the carriers supported by paid freight bills or other appropriate evidence.

The authority of the Interstate Commerce Commission to issue a refund order was challenged by the motor carriers in a judicial review proceeding filed before a three-judge court in Colorado. The Court upheld the Commission. *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353. This decision was appealed and affirmed, without opinion, by the Supreme Court. *Admiral-Merchants Motor Freight, Inc.* v. *United States, supra.*

The District Court rested its decision upholding the refund provision on the grounds that it was inserted by the Interstate Commerce Commission as an incident to granting a request for a continuance by respondents.[1]

Thus, petitioners have already contested the validity of the refund order in the Commission, in the Colorado District Court, and in the Supreme Court. In each forum they lost. The refund order has been held valid and it is not open to question in this case.

Prior to the expiration of the statute of limitations, respondent filed suits to enforce the Commission's refund order against petitioners. The District Court, upon motion for summary judgment filed by plaintiff, granted judgment for respondent, Alu-

[1] It is to be noted that at page four of the petition, it is stated that the request for continuance was initiated by protestants and *acquiesced in* by the motor carrier respondents. This is not in accordance with the record. See Appendix C-5 wherein the Colorado District Court quoted a letter filed by respondents requesting a postponement because of the impossibility for respondents to compile the required data.

minum Company of America.[2] On appeal the District Court's judgment was affirmed.[3]

ARGUMENT IN OPPOSITION TO GRANT OF CERTIORARI

1. These cases do not involve power of the Interstate Commerce Commission to issue a refund order. That issue is closed. This Court has entered its judgment upholding the validity of the order. Respondent filed these cases to enforce the refund order of the Interstate Commerce Commission. Thus, this is nothing more than an action by a private party to enforce a Commission order entered for its benefit.

Section 16(2) provides that, upon failure to comply with an order for payment of money, any person for whose benefit such order was made may enforce the order by filing suit in the United States District Court. Section 205(g) of Part II of the Interstate Commerce Act provides that any final order made under Part II shall be subject to the same right of relief in court as is now provided with respect to orders of the Commission under Part I. The refund order was a final order issued under Part II of the Act. As the trial court held (see Appendix D-10):

> "Because no doubt exists that we are dealing with a final order made under Part II of the Interstate Commerce Act and because we have concluded above that the plaintiff is a party in interest to such order, we must, therefore, look to Part I of the Act to determine the scope of plaintiff's rights."

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[2] *Aluminum Company of America* v. *Admiral-Merchants Motor Freight, Inc.*, 337 F. Supp. 674; *Aluminum Company of America* v. *Burlington Truck Lines, Inc.*, 342 F. Supp. 166.

[3] *Aluminum Company of America* v. *Admiral-Merchants Motor Freight, Inc.*, —— F.2d —— (7th Cir., 1972).

The pertinent section of Part I is Section 16(2) and no one denies that this confers upon shippers, such as respondent herein, the right to enforce an order for payment of money issued for the benefit of such shippers.

2. Petitioners apparently confuse the right of a shipper to enforce a Commission order for the payment of money with the issue as to whether the Commission has the power to grant reparations in a motor carrier case (petition, p. 8-9). The Supreme Court's opinion in *TIME, Inc.* v. *United States,* 359 U.S. 464, 470, 3 L.Ed.2d 952, 795 S. Ct. 904 (1959), involved a shipper's right to reparations. It did not involve its right to enforce a refund order. Petitioners assert that, because the *TIME* case held that the Commission could not issue reparations orders under Part II, this means that shippers cannot enforce refund orders under Part II. The two are not related and the argument of petitioners is fallacious.

The essence of petitioners' argument seems to be that the Interstate Commerce Act empowers the Commission to enter a refund order on behalf of shippers but denies such shippers any right to collect such refund. This is an absurd construction. It would be a strange result for a court to hold that an order was valid but the parties for whose benefit it was issued had no standing to collect the refund or enforce the order.

3. Petitioners assert that the precedent established in these cases will have repercussions of enormous magnitude (petition, pp. 9-11). It is stated that 143 complaints have been filed in 21 different state and federal courts and that millions of dollars will be involved. Assuming the accuracy of these representa-

tions, this provides no basis for granting a writ of certiorari. Petitioners collected the increased charges during the pendency of the general rate investigation. They received the benefit of a continuance of the hearing, and one of the conditions of the continuance was a refund of the disputed increase in the event of an adverse decision. As the Court of Appeals stated in its opinion "Having accepted the benefits afforded by the continuance of the rate hearing, defendants should now be required to provide the agreed upon exchange —*quid pro quo.*" (App. D-67).

4. Petitioners seek to leave the impression that there is a conflict among decisions in the various circuits regarding the merits of the shipper's right to enforce the refund order of the Commission (page 10 of the petition). However, petitioners do not cite any case where, *on the merits,* a result contrary to the judgment rendered by the lower court in this case was reached. The one reported case, *Bela Seating Company* v. *Advance Transportation Co.,* 344 F. Supp. 854 (1972) cited as adverse to the lower court's ruling, held that summary judgment was denied because the essential affidavits necessary for such a motion were totally missing. Significantly, in that case, the court *denied a motion to dismiss by the motor carriers because the complaint did state a cause of action under Section 16(2) of the Interstate Commerce Act.* Consequently, it is clear that the *Bela* case is completely consistent with the opinions of the lower court in this case and is not inconsistent as is implied by petitioners.

5. Petitioners assert that the effect of the Commission's action in the *Middle West* case, *supra,* was to place an unconscionable burden on motor carriers

who are seeking increases in freight rates (p. 11-13 of petition). They contend that, regardless of the statutory period for suspension of rates, no carrier can put increases of rates into effect until final approval by the Commission without running the risk of "punitive repayment" orders.

Such assertions are completely without foundation. The Commission did not suspend the increased rates which became effective April 1, 1968. The increased rates were collected for nearly a year and a half from the shipping public. At the end of that time, the Commission found that the increases had not been shown to be just and reasonable.

The motor carriers are obviously paying no refund claims voluntarily. They have not paid respondent's claim as of this time. It is asserted that millions of dollars are involved. But the carriers have had the use of funds derived from these increases for over four years. The Commission has held that they were not entitled to such increases. Petitioners have thus, in effect, had the advantage of an involuntary loan from the shipping public. Furthermore, because of the enormous time and expense involved, many shippers will not even attempt to recover the refunds which are due to them under the Commission's order.

It was pointed out in the Court below that refund orders are not normally issued by the Interstate Commerce Commission.[4] The peculiar circumstances involved in the Middle West case dictated the use of the refund procedure. The Commission permitted the increases to take effect prior to the rate investigation. It would be derelict in its responsibility to the public

[4] See court's opinion at App. D-62.

if it permitted the proceedings to drag on for a long period of time under those circumstances. When the carriers requested an extension of time for the hearing, the Commission conditioned the grant of such an extension upon the imposition of a refund provision. Thus, it is petitioners who have taken advantage of the shipping public—not the other way around. It is petitioners who are now forcing shippers to undergo costly federal court proceedings as a penalty to deter enforcement of claims. Clearly small shippers do not have the means or technical knowledge to permit them to enforce their rights and the refunds which are due to them will never be recovered. It is sheer nonsense to argue that it is the motor carriers who have been badly used by the Commission, the courts and the public.

6. The final argument made by petitioners in support of granting a writ of certiorari involves a contention that petitioners were denied an opportunity to prove that the rates and charges collected were just and reasonable (petition p. 15-17). It is contended that the Commission's finding that the assailed rates had "not been shown to be just and reasonable" is a different proposition than a finding that such rates are unjust and unreasonable. Once again, as pointed out many times in the opinions below, petitioners are attempting to treat this proceeding as a reparations proceeding where the burden of proof is on plaintiffs to prove that the assailed rates are unjust and unreasonable. This is nothing of the kind. This case is simply an enforcement proceeding whereby respondent, as a shipper, seeks to enforce a refund order entered by the Interstate Commerce Commission for the benefit of shippers generally. If the refund order is valid, and this Court has already held

that it is, then this respondent, as well as other shippers, are entitled to avail themselves of the remedies for enforcement as provided by the Interstate Commerce Act.

CONCLUSION

This case, when stripped of the many ingenious, but wholly irrelevant legal theories, is very simple. The Interstate Commerce Commission ordered petitioners to refund certain freight charges which the Commission found not shown to be just and reasonable. That refund order was vigorously attacked by petitioners but was ultimately upheld. All respondent seeks in this proceeding is that which the Commission's order states it is entitled to. The Act clearly gives respondent the right to enforce such an order in the District Court. Nothing else is involved. It would be unthinkable for this Court to waste its time on a matter of so small significance.

WHEREFORE, the premises considered the writ of certiorari prayed for by petitioners should be denied.

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November 19, 1973

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In the Supreme Court of the United States

October Term, 1973

No. No. 73-669

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al,

Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al,
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v.

ALUMINUM COMPANY OF AMERICA,
Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioners, motor carriers, herein renew their prayer that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the proceedings on July 12, 1973.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent shipper's Statement of the Case and its brief in opposition seem to suggest that the Commission, in the investigation proceedings which underlie the present suit, was dealing with past charges. That proceeding, *Increased Rates and Charges From, To and Between Middlewest Territory*, 335 I.C.C. 142 (1969), involved an investigation of tariff items which were effective throughout the course of the Com-

mission's investigation proceeding. Indeed, those rates were being applied even after the Commission's reasoned decision of June 5, 1969, and thereafter until the August 30, 1969 cancellation date. It is obvious, therefore, that evidence regarding such shipments as formed the basis for the claims in the court below and the past charges thereon were not and could not have been before the I.C.C. in the course of the investigation proceeding. By the same token, the actual cost, expense and revenue information surrounding the actual shipments involved in the present "enforcement" suits could not have been before the Commission in the investigation proceeding.

The carriers did attempt to present historic evidence to the I.C.C. relating to a portion of the shipments of freight under the tariffs which had been increased effective April 1, 1968. That attempt was made following the entry of the Commission's "refund order" of June 5, 1969. However, that request for further hearing and the tender of supporting evidence was rejected by the Commission in the investigation docket. B-31.[1]

Later before the three-judge tribunal on direct appeal of the refund language, the carriers sought to have the historic evidence relating to shipments transported under the increased tariffs evaluated, but the three-judge tribunal held that the case before it was not an enforcement proceeding. *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F. Supp. 353 (D.Colo., 1971). On appeal, this Court affirmed the three-judge court's refusal to annul. 404 U.S. 802, 30 L. Ed.2d 37, 92 S. Ct. 51 (1971), petition for rehearing denied, 404 U.S. 987, 30 L. Ed.2d 371, 92 S. Ct. 443 (1971).

Respondent shipper in its Brief in Opposition also suggests that the three-judge court held the refund language valid. While the three-judge tribunal refused to annul that language, apparently because of the inequitable posture of the plaintiff carriers, at no time did it state that the refund language was enforceable – those issues were left to the enforcement court. *Cf., Interstate Commerce Comm'n v. Atlantic Coast Line R.R.*, 383 U.S. 576, 16 L. Ed.2d 109, 86 S. Ct. 1000 (1966).

[1] The reference is to Appendix B(5) of Appellant's Petition.

REASONS FOR GRANTING THE WRIT

1. Respondent shipper asserts in its Brief in Opposition that:

> The remaining question as to whether Section 16(2) of the Interstate Commerce Act has been incorporated into the Motor Carrier Act so as to establish a private cause of action for enforcement of an I.C.C. order for the payment of money, is so clearly established that it does not warrant further consideration from this Court.

Petitioners respectfully note that not one case is cited by Respondent in support of this alleged prior clear establishment. Indeed, there is no precedent for such incorporation, as was conceded by the Seventh Circuit. The Commission's refund order is also unique in history of the Interstate Commerce Act. It was not a reparations order entered under Part I in compliance with the provisions thereof; nor was it of the type for which the Part I enforcement provisions were created. Nor would the order have qualified as a refund order under Part I, since none of the requirements of 49 U.S.C., Section 15(7) had been met.

There is not even any rail precedent for the enforcement of a Commission order such as the present order by private shippers against railroads. Section 16 deals with Commission rail reparations orders. But, under Part II, the Commission's power is limited to issuing findings in aid of a court suit for reparations. The Part I provision applied has been determined to be simply a reparations enforcement provision. In dealing with the limitations provisions contained in Section 16(3) which are integrated into the cause of action under Section 16(2), this Court stated:

> On its face it has to do only with the commencement of actions or *reparation* proceedings before the Commission. *United States v. Western Pac. R.R.*, 352 U.S. 59, 1 L. Ed.2d 126, 136, 77 S. Ct. 161 (1956). (Emphasis added).

However, the instant case and the Commission's decisions were not related to reparations. B-33, B-34, B-35, D, 11, D-11, D-12, D-35, and D-62. The finding which is the *sine qua non* of a suit seeking deviation from effective tariff levels – that the actual charges were unjust and unreasonable when applied – has never been made, as was noted by the courts below. In applying the provisions of Section 16(2), the Seventh Circuit below concurrently refused application of the conditions precedent set forth in the normally adjunct provisions of Section 16(1). D-65. Under these circumstances, it is apparent that prior precedent consistent with the determinations of the courts below cannot be located.

2. The ramifications of the circuit decision are utterly inconsistent with prior determinations by this Court. A major ramification involving a direct conflict with prior precedent of this Court is the reliance by Respondent and the courts below upon the purported "agreement" or "waiver" by the carriers. The following principle with respect to such waiver or agreement has been consistently followed throughout the course of the Interstate Commerce Act's application.

> The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. *A. J. Phillips Co. v. Grand Trunk W. R.R.*, 236 U.S. 662, 667, 59 L. Ed. 774, 777, 35 S. Ct. 444 (1915).

See also *Ky. Nat'l Gas Co. v. R.R. Comm'n*, 290 U.S. 264, 78 L. Ed. 307, 54 S. Ct. 154 (1933), (no estoppel); *United States v. Chicago M. & St. P. & P. R.R.*, 282 U.S. 311, 75 L. Ed. 359, 51 S. Ct. 159 (1931), (no acceptance of invalid portion of order by acceptance of valid portion); *United States v. Western Pac. R.R.*, *supra*, (private shippers not entitled to utilize estoppel to justify variation from rates charged under effective tariffs); and cases cited at page 14 of Petition for Certiorari.

3. The carriers, in the court below, sought to defend the cases, *inter alia*, on the grounds of the affirmative reasonableness of the rates when applied to the shipments involved (*United States v. Western Pac. R.R., supra*) and upon the grounds that the refund language, when applied, would result in confiscation of property (*Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 80 L. Ed. 1209, 56 S. Ct. 797 (1936)). These defenses were foreclosed by the strict liability holding of the court below which effectively made the "not shown" finding of the Commission conclusive in respect of an enforcement case, contrary to all prior precedent in this Court and contrary to the statutory language contained in Section 16(2).

> If the Commission finds that the proposed rates are unreasonable, *rather than that the railroads failed to carry their burden of proof*, that finding *might* be conclusive in a subsequent proceeding. *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, ____ U.S. ____, 37 L. Ed.2d 350, 93 S. Ct. ____ (1973), at n. 9 (Emphasis added).

Concurrently, the enforcement courts below refused the carriers access to a challenge of the admissibility of the order

> on the grounds, for example that the Commission did not afford the carrier a fair hearing or that the order was based upon substantial evidence. *Interstate Commerce Comm'n v. Atlantic Coast Line R.R.*, 383 U.S. 576, 594, n.6, 16 L. Ed.2d 109, 86 S. Ct. 1000 (1966).

In point of fact, there has never been any judicial contest permitted regarding the actual historic facts surrounding the shipments upon which the Respondent shipper below sought to obtain deviations from the unsuspended and effective tariff charges and recovery of damages.

4. Respondent has challenged the Petitioners' reliance upon this Court's opinion in *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 3 L. Ed.2d 952, 79 S. Ct. 904 (1959), as being wholly inapplicable. To the contrary, not only is the rationale

of that case direct and express in opposition to the result reached below, but, indeed, on the merits, that case involved and considered the refunds concept itself. In *United States v. Davidson Transfer & Storage Co.*, 259 F.2d 802, 805, 806 (D.C. Cir., 1958), the court noted that refunds could not be awarded against motor carriers, there being no Section 15(7) in Part II of the Interstate Commerce Act. While the decision of the D.C. Circuit was reversed in *T.I.M.E., Inc. v. United States, supra*, the reversal did not affect in any way the conclusion drawn by the Circuit with respect to the availability of refund orders against motor carriers. The reversal in the Supreme Court was because the Circuit had ordered a remand to the I.C.C. to make findings which, under the then existing status of the law, could not be implemented once made. In short, the *T.I.M.E.* decision has far broader application to this proceeding than Respondent is willing to recognize.

5. Respondent shipper implies that there is no conflict between the decisions which have derived from the refund language of the Commission in I.C.C. Docket No. 34971 on the merits in the various enforcement cases.[2] Respondents respectfully refer the Court to Appendix A attached to the Petition for Certiorari. It will be noted, *inter alia*, that the sister complaint of *Container Corporation* was dismissed and judgment was entered for the defendant carriers therein. *Container Corp. v. Admiral-Merchants Motor Freight, Inc.*,

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[2]It asserts that the only potentially adverse decision was *Bela Seating Company v. Advance Transportation Co.*, 344 F. Supp. 854 (N.D. Ill., 1972). That case, decided by the same trial judge who decided the cases involved in the instant Petition, does indeed present a conflict on the merits – but only in respect of the statute of limitations questions which were determined differently therein. Indeed, the *Bela* decision is itself in direct conflict with prior precedents of this court, e.g., *A. J. Phillips v. Grand Trunk W. R.R., supra.* Whereas, the court in *Bela* ruled that the limitation on shipper's right to sue "within one year of the date of the order" was tolled by the direct appeal litigation, this Honorable Court held, in *Phillips*, that the plaintiff must sue within the exact period set forth in the statute in compliance with the statutory language, irrespective of direct appeals – or, that the plaintiff must join in the direct attack upon the Commission's order in order to preserve its claim.

Civil Action No. 71-C-996 (N.D. Ill., 1972), appeal pending, Seventh Circuit Docket 72-1646. Furthermore, the lower court decisions are highly deviant on issues such as the awarding of pre-judgment interest and attorney fees – a matter obviously causing wide variances in net rates between shippers. But, the enormity of the importance of the issues sought to be presented cannot be minimized by the lack of conflicts between the circuits. Conflicts have been shown to exist with prior decisions of this Honorable Court. The order being totally unique in the history of the Act, and the present case being the first to reach the appellate courts, it is to be expected that there would be no developed substantial conflicts on the merits, simply because the underlying I.C.C. order is unique and no courts have considered the issues prior to the ingenious approaches and novel rulings below.

6. It is interesting to note that Respondent's brief barely touches upon the extreme importance of the questions presented in terms of the continued and future application of the Interstate Commerce Act – to the entire transportation industry regulated by the Commission, to the shippers, and to the consuming public. These important questions of federal law should be settled by this Court.

CONCLUSION

The carrier Petitioners have consistently sought an opportunity to have the claims tested upon judicial facts and historical evidence. Fundamental fairness would seem to require a hearing *at some stage* before a person is deprived of monies collected pursuant to tariffs which not only have the force and effect of a statute (*Pennsylvania R.R. v. Int'l Coal Mining Co.*, 230 U.S. 184, 57 L. Ed. 1446, 33 S. Ct. 893 (1913)), but carry a presumption of lawfulness, even though carrier-initiated. That presumption was not modified by the finding that the rates had not been proven just and reasonable for the *future*. Two inconclusive determinations (that the rates involved were not shown to be just and reasonable for the future, and that the carriers lacked sufficient equity to obtain an equitable annulment of the order) have been manipulated by the court

below into strict liability foreclosing virtually all attacks, including attacks based upon the Federal Constitution, in the enforcement proceeding.

WHEREFORE, premises considered, the Petitioners again pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, and that, following the issuance thereof, this Honorable Court reverse said judgment and opinion.

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